

1-1-1962

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### Recommended Citation

Richard V. Barndt, *Two Trees or One? – The Problem of Intra-Enterprise Conspiracy*, 23 Mont. L. Rev. (1961).

Available at: <https://scholarworks.umt.edu/mlr/vol23/iss2/2>

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## Two Trees or One?—The Problem of Intra-Enterprise Conspiracy

By RICHARD V. BARNDT\*

### INTRODUCTION

An analysis of the Federal Antitrust Laws in action, while revealing that many types of conduct are easily established as being hard core violations, clearly indicates that other types of conduct still remain in the category where neither logic nor experience appear to justify a conclusive determination of legality.<sup>1</sup> The purpose of the present paper is to treat the topic of intra-enterprise conspiracy, one of the most perplexing of these "twilight" areas.<sup>2</sup> In addition to defining and evaluating the types of conduct included in the concept, and considering the cases dealing with the problem, an attempt will be made to direct permissible courses of action, rather than simply to proscribe that conduct which is possibly hazardous. While it should be conceded that negative counseling, being preventive in character, has a time-honored place in the legal profession, it should likewise be recognized that the duty to give positive counseling, in the nature of alternative and permissible courses of conduct, is equally as important.

There are three distinct, though connected, types of relationships which give rise to conduct possibly included within the area of intra-enterprise conspiracy. These are: first, the situation where the officers of a single corporate body engage in conduct among themselves in carrying out the business of the corporation; secondly, dealings between a parent and its subsidiary or subsidiaries or dealings merely between the latter;<sup>3</sup> and thirdly, transactions between corporate bodies controlled by the same individual or

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<sup>1</sup>For an extensive presentation and analysis of problems posed in this area see Johnston, *Some Twilight Zone Antitrust Problems*, 1 ANTITRUST BULL. 615 (1956). The author observes that "no doubt many of you will say that most antitrust problems, because of the generality and vagueness of the statutes, are in the Twilight Zone." *Id.* at 615.

<sup>2</sup>This problem has received extensive treatment, and has caused a divergence of opinion both as to the *is* and to the *ought* as will appear from an analysis of the authorities cited throughout this article. These range from the position taken that the conspiracy clauses of the Sherman Act can reach activities undertaken by corporate officers among themselves, Kramer, *Does Concerted Action Solely Between a Corporation and Its Officers Acting on Its Behalf in Unreasonable Restraint of Interstate Commerce Violate Section 1 of the Sherman Act?* 11 FED. B.J. 130 (1951), to the position that "unless it contravenes the monopoly provisions, an organization compared of a single enterprise [and this includes vertical integration by the pyramiding of corporations] is entitled to freedom from Sherman Act liability." McQuade, *Conspiracy, Multicorporate Enterprises, and Section 1 of the Sherman Act*, 41 VA. L. REV. 183, 214-15 (1955). Perhaps the latest "official" allusion to the problem was in *Poller v. Columbia Broadcasting System*, 82 Sup. Ct. 486 (1962), where the Court, in answer to an argument that the defendant could not conspire with itself, stated that "this begs the question for the allegation is that independent parties . . . conspired with CBS and its officers." 82 Sup. Ct. at 489. The Court observed in a footnote that it would not pass upon the contention of the plaintiff that the defendant's corporate arrangement of divisions "came within the rule as to corporate subsidiaries." *Id.* at 489 n.4. This implies at the least the continuing vitality of the conspiracy charge in a multicorporate setting.

<sup>3</sup>That is, the dealings may be between the parent and its subsidiary(ies), or between the sister corporations themselves to the exclusion of the parent.

group of individuals. Though all these relationships are occasionally described as being "intra-corporate" it would appear that properly they are described as "intra-enterprise" while "intra-corporate" more properly should be restricted to the first of the three relationships—i.e., the conduct of a single corporation's officers acting in its behalf.<sup>4</sup>

Transactions occurring in any of these three contexts give rise to intra-enterprise conduct. The problem to be resolved is to decide if, and when, the conduct in question can be held to be conspiratorial and hence satisfy the requirements of a Sherman Act conspiracy.<sup>5</sup> At this point it may be well to point out that the topic under consideration is concerned only with that type of conduct which requires the cooperation of two or more persons.<sup>6</sup> Hence any type of conduct which utilizes but one party for its performance poses no particular problem in the present context. Thus a corporation acting alone, acting with its subsidiaries, or with a brother or sister corporation, or acting with another corporation controlled by the same interests, is clearly subject to the proscriptions of the non-conspiracy portion of section 2 of the Sherman Act.<sup>7</sup>

<sup>4</sup>This is the terminology employed by the Attorney General's National Committee, *Report of the Attorney General's National Committee to Study the Antitrust Laws* 30 (1955) (Hereinafter cited *Committee Report*), and seems preferable to other designations. For instance, the use of the term "inter-corporate" to describe a class two or three transaction, as in Comment, 100 PA. L. REV. 1006, 1010 (1952), is so general that it also covers transactions between unrelated corporations.

<sup>5</sup>"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . ." 15 U.S.C. § 1 (1958). "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. . . ." 15 U.S.C. § 2 (1958). It should be noted that this section would be more clear if the comma following "persons" had been placed two words to the right, after "monopoly."

<sup>6</sup>"The accepted definition of a conspiracy is, a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means." *Duplex Printing Press Company v. Deering*, 254 U.S. 443, 465 (1921). Though no one definition of conspiracy has been adopted, it is conceded that the nature of the thing requires at least two active parties. Thus it is said that to define conspiracy as a "combination between two or more persons to accomplish a criminal or unlawful act, or to do a lawful act by criminal or unlawful means, . . . is needlessly verbose . . . since one party cannot combine with himself. . . ." PERKINS, CRIMINAL LAW 528 (1957). And Justice Holmes referred to conspiracy as a "partnership in criminal purposes." *United States v. Kissel*, 218 U.S. 601, 608 (1910), which again highlights the requirement of duality of participants. It has been submitted that conspiracy requires the three qualities of subjective agreement, duality of participants, and method as a subordination to an unlawful result. Ruhl, CONSPIRACY AND THE ANTITRUST LAWS, 44 ILL. L. REV. 743, 751-52 (1950).

<sup>7</sup>Obviously, Section 1 always requires two or more parties, since a contract or a combination can no more be formed by an individual acting alone than can a conspiracy. But both the monopolization and the attempt to monopolize clauses of Section 2 require but one person for their accomplishment. It has been asserted that the test of conspiracy under Section 2 creates a lesser problem in this regard than does the test under Section 1. "Since monopolization is made a crime by itself, conspiracy to monopolize is clearly analogous to the ordinary conspiracy cases in which a corporation and its officers have been held to be capable of forming a conspiracy. Yet to apply a different test to a charge of conspiracy in restraint of trade than to a charge of conspiring to monopolize results in making the word "conspiracy" in Section 1 exclude conduct which the word "conspire" in Section 2 embraces. It is an elementary canon of statutory construction that, absent some positive contrary indication, the same word wherever used in the same statute has the same meaning." Kramer, *supra* note 2, at 135.

On the other hand, section 1 of the Sherman Act declares to be unlawful "every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade. . . ."<sup>8</sup> This section, therefore, is the focal point of the intra-enterprise conspiracy concept. Since the section is by definition inapplicable to a single entity, any proceeding which must depend upon it for successful prosecution must first hurdle the obstacle of the single enterprise defense.<sup>9</sup>

The respective positions of the prosecutor and the defense in such a proceeding may be likened to that of the landowner and the tree remover who were faced with the problem of determining, for the purpose of a per unit contract, whether a botanical growth which forked immediately at the level of the ground was one tree or two trees. While the landholder firmly asserted that "these two trees are one," the woodsman was equally adamant in stressing that "this is two trees."<sup>10</sup> Without debating the connotations implicit in the observation that, in such an instance, one's view would depend, in the absence of the subjective motives possessed by the two actors, on whether he were a squirrel or a gopher, the cases which have dealt with or avoided the problem will be considered.<sup>11</sup>

### INTRA-CORPORATE CONDUCT

Perhaps the most troublesome of the three situations under consideration involves those cases wherein a single corporation or its officers or both, are charged, with a violation of section 1 of the Sherman Act or that portion of section 2 which requires a plurality of actors,<sup>12</sup> for conduct solely between such corporation and its officers or between the officers themselves.<sup>13</sup>

Representative of much of the present thinking in this area is that of the Attorney General's National Committee which stated:<sup>14</sup>

It has long been the law that where a corporation commits a substantive crime, the officers and directors who participated in the illicit venture are guilty of criminal conspiracy. . . . But because Section 1 of the Sherman Act does not make restraining trade, as distinguished from a Section 2 charge of monopolizing trade, a substantive offense, *it does not follow as a matter of logic* that the concerted action of corporate officers acting on the corporation's behalf . . . constitutes a conspiracy in violation of Section 1. (Emphasis added.)

After asserting that those cases which have held such conduct violative of Section 1 could be sustained upon other grounds, and that in no case has a

<sup>8</sup>See note 5 *supra*.

<sup>9</sup>See note 7 *supra*, and note 74 *infra*.

<sup>10</sup>For the purpose of giving credit where credit is due the author acknowledges that this episode was related to him while he was enrolled at the College of Law of the University of Utah, by Professor Thomas Christy Chapin, who is now practicing law in Denver, Colorado. If memory serves me correctly the dispute was said to have occurred on the campus of the University of Connecticut.

<sup>11</sup>Needless to say, the subjective motivations are not limited to the anecdotal context.

<sup>12</sup>That is, with the conspiracy portion as opposed to the substantive monopolization, or the less stringent "attempt" provision. See note 7 *supra*.

<sup>13</sup>As to the need for exactitude in the use of language in this setting see note 134 *infra*.

<sup>14</sup>COMMITTEE REPORT 30-31.

court found a violation where the Section 1 charge was independent of collateral support,<sup>15</sup> the Report continues in a vein which indicates that the italicized portion could be phrased in this manner: *It follows as a matter of logic that the concerted action of corporate officers acting on the corporation's behalf does not constitute a conspiracy in violation of section 1.* Thus they state that:<sup>16</sup>

Restraining trade is not illegal, but only contracting, combining and conspiring in restraint of trade. Since a corporation can only act through its officers, and since the normal commercial conduct of a single trader acting alone may restrain trade, *many activities of any business could be interdicted were joint action solely by the agents of a single corporation acting on its behalf itself held to constitute a conspiracy in restraint of trade.* (Emphasis added.)

Without disputing the lack of desirability of the effects forecast by the Committee<sup>17</sup> or the logical conclusion felt to be impelled therefrom, an analysis will be made of the cases to determine whether a judicial attitude was a precursor to the Committee's position and to see whether that attitude is correctly reflected in the Committee Report.

One of the first cases to consider the intra-corporate phase of the intra-enterprise conspiracy concept was *Union Pacific Coal Co. v. United States*.<sup>18</sup> The defendants, Union Pacific Coal Company, James M. Moore—its agent, Union Pacific Railroad, Oregon Short Line Railroad, and Everett Buckingham—agent for the railroads, were charged with, and convicted of, combining,<sup>19</sup> (conspiring) in violation of section 1, to deprive a Salt Lake City coal dealer (Sharp) of his supply of coal. On appeal by defendants the court observed that "there is nothing in the Act of July 2, 1890, which deprived the coal company of [certain] common rights of . . . vendors of merchandise, and if it did not combine with some other person or persons so to do its refusal to sell its coal to Sharp . . . was not the violation of the Sherman anti-trust Act charged in the indictment."<sup>20</sup>

<sup>15</sup>Thus they state that "the only reported decisions on the question have found no conspiracy in restraint of trade in joint action solely between a corporation and its officers acting in its behalf." COMMITTEE REPORT at 31. However, it should be noted that there is a good deal of difference between stating that no decision has found a conspiracy and stating that cases have found that there *could* be no conspiracy. Yet, the cases they cite for their proposition could be cited for the latter position at least by dictum if not holding.

<sup>16</sup>COMMITTEE REPORT at 31. The Committee seemed to fear that to accept the intra-corporate conspiracy rationale would be to spell the demise of organized business activity, and that accordingly the cause of this calamitous occurrence should, though conceived, be aborted. Though it may be conceded that if this "parade of imaginable horrible" were a real possibility, the suggested cure should be used to remove the bane, it would further appear that other alternatives may present themselves. See note 283 *infra*.

<sup>17</sup>See notes 175-82 *infra*, and accompanying text. And see Kramer, *supra* note 2, at 141, where he states that if this result were reached "a significant loophole would be afforded corporations engaging, without the assistance of outsiders, in activities that unreasonably restrain trade."

<sup>18</sup>173 Fed. 737 (8th Cir. 1909).

<sup>19</sup>Though the charge in the indictment was that the defendants had *combined* to perform the challenged acts, in substance the problem is the same as if a *conspiracy* had been charged. Indeed it is not clear where the two terms meet and where they part company. Thus part of the definition of conspiracy is that it is a combination of two or more persons for a stated purpose. See note 6 *supra*. Hence it would seem that any combination which results in a restraint of trade of an unreasonable nature could also be attacked as a conspiracy.

<sup>20</sup>173 Fed. at 739.

In spite of the common stock ownership,<sup>21</sup> the undisputed finding that Buckingham and the railroads did not know that Moore had cut off Sharp's supply until two days after the fact was held to prove that the latter three defendants were not parties to a combination.<sup>22</sup> Hence any unlawful combination would necessarily lie between the coal company and its agent Moore. In reply to the government's argument that the testimony was sufficient to convict them of combining (conspiring) with each other, the court stated:<sup>23</sup>

But no case has been called to our attention that sustains the position that *an agent* of a corporation *may alone* form an unlawful combination between himself and his corporation by his thoughts and acts within the scope of his agency, *without the knowledge or participation of any other agent or officer of the corporation*. If he may, the distinction between the commission of an offense and a combination to commit it by a corporation vanishes into thin air. . . . *The union of two or more persons, the conscious participation in the scheme of two or more minds, is indispensable to an unlawful combination, and it cannot be created by the action of one man alone.* (Emphasis added.)

It should be noted for purposes of later development that the court by negative implication left open the possibility of a violation where two or more officers are involved. However, it also should be noted that the same reasoning which the court used to strike down the government's present allegation is frequently used to refute the implication of the court's dictum.<sup>24</sup>

The next case of importance to emerge in chronological order is *Patterson v. United States*.<sup>25</sup> In commenting on this case the Attorney General's National Committee stated that "despite the holding in *Patterson* as well as *White Bear* under Section 1, plaintiffs in both cases charged violations of Section 2, thus making unnecessary to the result the brief discussion of the applicability of Section 1 to these facts."<sup>26</sup> (Emphasis added.) The Committee had previously stated that the case concluded that a group of corporate employees of the National Cash Register Company, including its president, John H. Patterson, could be held guilty of violating sections 1 and 2 of the Sherman Act where the employees carried out a predatory policy looking to a monopoly of the cash register business.<sup>27</sup>

<sup>21</sup>The Union Pacific Railroad owned all of the stock in the coal company. 173 Fed. at 741.

<sup>22</sup>*Id.* at 744. The court further pointed out that after learning of the actions of Moore, the agents of the other corporate defendants were powerless to interfere.

<sup>23</sup>173 Fed. at 745.

<sup>24</sup>"... [E]very time an agent commits an offense within the scope of his authority under this theory the corporation necessarily combines with him to commit it." 173 Fed. at 745. This same reasoning can be adopted to the dual officer situation. See *infra* at note 86. And see *Developments in the Law of Criminal Conspiracy*, 72 HARV. L. REV. 920, 952-53 (1959). It is interesting to note that the facts of the instant case would probably have sustained a charge of an unlawful agreement to boycott, since Moore had been notified by a competitor that if Sharp continued his undercutting of the prices then said competitor would indulge in a price cutting campaign on his own. 173 Fed. at 741. *Cf.*, *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960).

<sup>25</sup>222 Fed. 599 (6th Cir. 1915).

<sup>26</sup>COMMITTEE REPORT 31.

<sup>27</sup>*Ibid.*

It is submitted that this case can not be passed over so lightly since it is among the few which have taken a reasoned position on the problem which was alluded to in *Union Pacific Coal Company*<sup>28</sup> and with which we are here faced—i.e., can a conspiracy in restraint of trade in violation of section 1 of the Sherman Act be committed by corporate officers acting among themselves in behalf of the corporation. Since the court reached a positive conclusion on this basic question the merits of its position should be evaluated, rather than an effort made to pass off the result on tenuous grounds.<sup>29</sup>

An analysis of *Patterson* reveals that the "brief" discussion of the applicability of section 1 to the facts of that case were rather more penetrating than brief. The defendants had appealed from convictions based upon an indictment setting forth three counts, the first of which was based upon a conspiracy under section 1, and the second and third of which were based upon violations of section 2.<sup>30</sup>

Contrary to the impression created by the Committee Report, the appeal court upheld the first count while striking down the two counts based upon section 2 as being improperly pleaded.<sup>31</sup> Thus the court held that the argument complaining of the order overruling the demurrer to each count of the indictment would be honored as to the latter two though not as to the first.<sup>32</sup>

It is further interesting to note that "*the defendants requested that the jury be instructed to find them not guilty on the second and third (count).*"<sup>33</sup> (Emphasis added.) The court on appeal stated: "in accordance with our holding as to the sufficiency of these two counts, the defendants were entitled to have the jury so instructed. The first count alone (based on section 1) should have been submitted to them."<sup>34</sup> As the italicized portion clearly indicates, the thinking of the court in the case was so widely assumed and accepted that even those proceeded against did not

<sup>28</sup>*Union Pacific Coal Company v. United States*, 173 Fed. 737 (8th Cir. 1909), note 18 *supra*.

<sup>29</sup>It is conceded that the case would not be controlling and that its reasoning is not necessarily worthy of adoption. However, it is submitted that the proper means to avoid its implications would be through confession and avoidance and not through denial of its position, which plainly was that there was nothing anomalous about an intra-corporate conspiracy in violation of section 1 of the Sherman Act.

<sup>30</sup>222 Fed. at 609-10.

<sup>31</sup>"It must be held, therefore, that the first count is good." 222 Fed. at 617. "We see no escaping from the conclusion that the [second] count on this ground [the fact that the competitors whose business the defendants were alleged to be preempting were incapable of identification] is void for uncertainty." 222 Fed. at 623. "This brings us to the third count, and we need not spend much space upon it. It charges that the defendant, *having* before the 3 years preceding the indictment, *engaged in the unlawful conspiracy* described in the first count, . . . had monopolized the interstate trade and commerce in cash registers. . . . It will be noticed that the same uncertainty exists here [as in count two] as to the interstate trade and commerce in cash registers secured by the National Company. . . . On this ground the count is bad."

"But it is otherwise insufficient. It does not charge an offense against the United States, i.e., the offense of monopolizing a part of interstate trade and commerce, and that for two reasons. . . ." 222 Fed. at 624 (Emphasis added.)

<sup>32</sup>"On this ground we think the [second] count is defective, and that the court erred in overruling the demurrer thereto." 222 Fed. at 624. "It must be held, therefore, that the third count is bad, and the lower court erred in overruling the demurrer thereto." 222 Fed. at 626.

<sup>33</sup>222 Fed. at 649.

<sup>34</sup>*Ibid*.

consider the possibility that such a proceeding is logically beyond the proscriptions of section 1 of the Sherman Act.<sup>85</sup>

To decide whether the court was completely unsophisticated or whether we have become too much so we should turn to the reasoning of the court, which, because it was not addressing itself specifically to the problem, is scattered throughout the opinion. To begin with, as above mentioned, both the court and the defendants assumed that a group of corporate officers *could* be held guilty of a violation of section 1. The basic dispute as to the validity of the first count revolved about the problem of which of the 11 specific means by which the defendants were alleged to have conspired were sustained by the provable facts of the case.<sup>86</sup> Further topics of dispute were uncertainty, duplicity, and whether the count was defective in not alleging an offense against the United States *since not alleging facts showing that the trade and commerce conspired against was interstate*.<sup>87</sup> Hence, it is not peculiar for the court to hold simply, after disposing of these various allegations, "that the first count is good,"<sup>88</sup> without a mention of the doubts which presently prevail.

Moreover, in discussing the validity of the second count, the court, in dealing with a particular aspect of that problem, stated that:<sup>89</sup>

<sup>85</sup>It is interesting to note that while the trial lasted three months, resulted in criminal sentences being pronounced on 27 of the defendants, including imprisonment of the president of the company for one year, and culminated in an appeal listing 393 errors, the defendants at no point took the position that "these two trees are one," and that for that reason the first count was not good. This may admittedly be softened by the contention that outside contracts could have been shown, but see note 229 *infra*.

<sup>86</sup>In this regard the court was treating the contention that the jury should have been instructed peremptorily to find a verdict for them. The court pointed out that in resolving this question two things must be clearly understood. "One is as to what, under the evidence, was the case which it was open to the government to claim should be submitted to the jury." 222 Fed. at 627. After considering this the court stated that "the other thing which at this point should be clearly understood is whether, in order to there being such a case for submission to the jury, it is absolutely essential that anything was done in furtherance of such conspiracy within the 3 years preceding the indictment." 222 Fed. at 630. They conclude that it is not, and "... come, then, to the question whether the government was entitled to a submission of such case to the jury." 222 Fed. at 631. The court concluded that "... it [is] clear that there was substantial evidence to the effect that there was a conspiracy on the part of those officers and agents of the National Company who then had to do with competition. ..." 222 Fed. at 633.

<sup>87</sup>*Id.* at 615. These three contentions were put forth as grounds upon which a demurrer should have been sustained to each of the three counts. These contentions were supplemented by other assignments of error which will be subsequently considered in developing the analysis of this court's position on intra-corporate conspiracy. Though the court found the second and third counts defective for one or more of these three contentions, they felt them to be not seriously urged as to the first count except as to that maintaining that the jurisdictional effect had not been alleged. They held that a fair meaning of the indictment was that the business of the competitors was interstate, and that hence the jurisdictional requisite was furnished. It is to be noted that this case was in the era of constitutional limitations of stringent nature on the commerce clause. For an indication of the vastly expanded concepts in this area see *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207 (1959). However, the court itself noted "there is no act of interstate trade or commerce so insignificant as not to be protected by it." 222 Fed. at 619.

<sup>88</sup>*Id.* at 617.

<sup>89</sup>222 Fed. at 618-19. The language of the court in dealing with the question of contradictory terms is understandable in the light of the recent involvement of the "rule of reason" as the test of violation of the Sherman Act. In *United States v. Trans-Missouri Freight Association*, 166 U.S. 290 (1897), the Supreme Court had seemingly taken a position that would have emasculated the flow of commerce. The Court stated, in reply to a contention that the Act should be so read as to cover



It should be approached through the first section. It is now settled that that section covers those contracts, combinations, and conspiracies only which are unreasonably in restraint of interstate trade or commerce. Possibly every conspiracy in restraint thereof is unreasonably so. This is on the idea that there is no such thing as a reasonable conspiracy, or a conspiracy to do a reasonable thing. It is a contradiction in terms. *The section includes conspiracies between competitors, or between the officers and agents of a competitor on its behalf against a competitor.* But it is not limited to such conspiracies. It includes also conspiracies between any persons, whoever they may be, against any other person. . . . It is not essential that the execution of the conspiracy be of any benefit to the conspirators. It is sufficient that it will be in restraint of another's interstate trade or commerce. . . . *Clearly, then, a conspiracy between the officers and agents of one competitor on its behalf in restraint of a single interstate sale or shipment of another competitor is covered by it.* (Emphasis added.)

In continuing its treatment of the section 2 count, the court pointed to the observation of Chief Justice White that monopolizing was a species of restraint of trade so that a combination or conspiracy to monopolize

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only those acts which are in unreasonable restraint of trade, that "the term is not of such limited signification. . . . When, . . . the body of an act pronounces as illegal every contract or combination in restraint of trade . . . the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in reasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress." 166 U.S. at 328. That four members of the Court saw the impractical effect of the above position is exemplified by their dissent written by Justice White, wherein it is asserted: "It is, I submit, not to be doubted that the interpretation of the words 'every contract in restraint of trade', so as to embrace within its purview every contract, however reasonable, would certainly work an enormous injustice and operate to the undue restraint of the liberties of the citizen. But there is no canon of interpretation which requires that the letter be followed, when by so doing an unreasonable result is accomplished. On the contrary, the rule is the other way, and exacts that the spirit which vivifies, and not the letter which killeth, is the proper guide by which to correctly interpret a statute." 166 U.S. at 354. That Justice Peckham, who wrote the majority opinion, may have at least felt that he had been unduly castigated is shown by a later opinion wherein he states: "To suppose, as is assumed by counsel, that the effect of the decision in the *Trans-Missouri* case is to render illegal most business contracts or combinations, however indispensable and necessary they may be, because, as they assert, they all restrain trade in some remote and indirect degree, is to make a most violent assumption, and one not called for or justified by the decision mentioned, or by any other decision of this court." *United States v. Joint Traffic Association*, 171 U.S. 505, 568 (1898). Doubts as to the Court's stand were resolved in *Standard Oil Company of New Jersey v. United States*, 221 U.S. 1 (1911). Chief Justice White, writing for the majority, stated: ". . . it inevitably follows that the provision necessarily called for the exercise of judgment which required that some standard should be resorted to for the purpose of determining whether the prohibitions contained in the statute had or had not in any given case been violated. Thus not specifying but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute, was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided." 221 U.S. at 60. Hence, though the *Patterson* court recognized that only unreasonable restraints are condemned it was bothered by the possibility that any conspiracy may be said to be unreasonable. However, as developed in the course of this article, it is submitted that this is to assume the matter in issue.

would violate both sections.<sup>40</sup> In the instant case the pleadings themselves were defective in alleging section 2 violations, hence necessitating reliance upon the count charging violation of section 1. The fact that the object of the conspiracy was monopolization is unimportant in the view of the court, which assumes, together with the defendants, that corporate officers can violate the conspiracy portion of section 1 of the Act.<sup>41</sup>

In addition to the action of the court in upholding the order denying defendants' demurrer to the first count, the jury direction asked by the defendants, and the language of the court in treating the second and third counts, the treatment by the court of the other assignments of error is replete with an assumption of the validity of a conspiracy charge against corporate officers for *intra-corporate* conduct. In direct refutation of the position taken by the Committee Report, the court stated that "... we limit the case which was open for the government to claim ... to whether the defendants (being the officers of the corporation) ... conspired in restraint of ... trade. ..."<sup>42</sup> The contention of the defendants was limited to the claim that only those officers who had to do with competition could be guilty of the conspiracy.<sup>43</sup> Throughout the course of the many assignments based upon the relevancy of admitted evidence the court assumes the validity of the conspiracy count.<sup>44</sup>

<sup>40</sup>222 Fed. at 620, citing *Standard Oil Company v. United States*, 221 U.S. 1, 31 (1911). As pointed out in note 7 *supra*, the suggestion has been made that the finding of a conspiracy under section 2 should create less of a conceptual problem than finding one under section 1, when only the officers of a single corporation are involved. This distinction hinges upon the contention that while section 2 makes monopolizing a substantive offense, section 1 does not make restraining trade a substantive offense, but only condemns the means by which it may be restrained. See note 284 *infra*.

<sup>41</sup>Though the first count was based upon a section 1 violation, it is readily apparent that the conspiracy had as its object the monopolization of the interstate trade in cash registers. That this would make some difference is supported to a certain extent by the following language of Justice White in the *Standard Oil* case: "In other words, having by the first section forbidden all means of monopolizing trade, that is, unduly restraining it by means of every contract, combination, etc., [conspiracy] the second section seeks, if possible, to make the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the first section, that is, restraints of trade, by any attempt to monopolize, or monopolization thereof, even although the acts by which such results are attempted to be brought about or are brought about be not embraced within the general enumeration of the first section." 221 U.S. at 61. Thus the contention could be made that the acts which are not within the general enumeration of section 1, are available in section 2, and that the results of *Patterson* are palatable because the section 2 charge was there in substance, if not in form, since the point on which the court sustained the demurrer was admitted to be "somewhat technical." 222 Fed. at 623. Yet the fact that a proceeding is barred by way of section 2 because of a technicality, would be little reason for permitting it to be brought about by an application of section 1 which was unjustified on its facts. This would indeed be "straining at a gnat and swallowing a camel."

<sup>42</sup>222 Fed. at 629.

<sup>43</sup>"In order for the defendants to have so conspired it is essential that they had such connection with the National Company that in the performance of their duties they had to do with its competitors. Those of its officers and agents who had nothing to do with competition, as, for instance, those in the manufacturing department, cannot be said to have so conspired. It is not sufficient to connect any officer or agent of the National Company with the conspiracy that they knew of it or acquiesced in it. They must by word or deed have become a party to it." 222 Fed. at 631.

<sup>44</sup>*E.g.*, "But even on the basis that the foregoing list exhausts all acts in restraint of the trade ... still we are constrained to hold that it was for the jury to determine whether the conspiracy continued. ... "222 Fed. at 638. (Emphasis added.)

Further, in treating the issue of exclusion of evidence,<sup>45</sup> the court, in dealing with the topic of patent validity, held that: "The only possible ground for its admissibility was to make good that defendants had the right to conspire in restraint of the interstate trade . . . and hence were not guilty of an offense under first section of the Anti-Trust Act in so doing."<sup>46</sup> The court continued:<sup>47</sup>

This brings before us the question whether . . . the officers and agents of a patentee, can conspire in restraint of the interstate trade or commerce in the article covered by the patent of persons who have no right to engage in such trade and commerce, and who by engaging therein infringe the right of the patentee. . . .

In answer to this question the court, after considering the common law and statutory rights of a patentee, stated:<sup>48</sup>

We are not concerned here with the question as to what a patentee may himself do in a general way to protect the substantive right which he has from invasion. The question in hand is whether he and another, *or his officers and agents in his interest*, may conspire to prevent an invasion of his rights in the interstate field by the use of any such means. *This depends solely on whether such a conspiracy is within the first section of the Anti-Trust Act. And it would seem that to ask this question is to answer it.* The terms of the section are of a most sweeping character. It includes every conspiracy in restraint of interstate trade or commerce. It is not a question whether it is rightful or wrongful interstate trade or commerce that is covered by the conspiracy. It is sufficient that it is interstate trade or commerce. If two or more persons in no way interested in a patent were to conspire in restraint of the interstate trade or commerce of an infringer, no one could contend that the conspiracy was not covered by the statute. *No more is it open to contend that a conspiracy by a patentee and another, or by the officers and agents of a patentee in his interest, to restrain the interstate trade or commerce of an infringer, is not within the statute.* The intent of the statute was to sweep away all conspiracies . . . whatever their character may be. (Emphasis added.)

Again the court's language is interesting not for its views on the relationships of patent law and anti-trust, but rather for its apparent *a*

<sup>45</sup>The treatment of this issue is contained at 222 Fed. at 639-49.

<sup>46</sup>*Id.* at 645. The court had earlier dealt with the contention that the case of *Virtue v. Creamery Packing Company*, 227 U.S. 8 (1913) had indicated that a patent would insulate defendants from attack under section 1. It noted that: "He (Justice McKenna) did not mean by that that no recovery could be had under that act for damages caused by a conspiracy in restraint of interstate trade by the malicious prosecution of suits for infringement. He meant no more than that it did not appear that there was any such conspiracy in that case. So far as appeared, both suits were brought in good faith.

But here there was evidence tending to show that suits were not brought in good faith, and, on the contrary, were an 'illicit use of the courts as instrumentalities of oppression.'" 222 Fed. at 643. If the instigation of malicious prosecution suits should be held to be an unreasonable restraint of trade the result should scarcely depend upon whether house or independent counsel were employed in the operation.

<sup>47</sup>222 Fed. at 645.

<sup>48</sup>*Id.* at 646.

*priori* assumption that officers and agents acting in behalf of their corporation can be held under the conspiracy phrase of section 1. This view of the court is further exemplified in their final treatment of instructions requested by defendants as to what it was lawful for them as agents of the company to do.<sup>49</sup>

The above analysis of the *Patterson* case indicates that the cavalier manner in which the Attorney General's National Committee brushed it aside is not befitting of the apparent general acceptance in the year 1915 of the proposition that *intra-corporate* conduct could constitute a conspiracy in violation of section 1 of the Sherman Act. Subsequent cases will now be considered in an effort to determine whether this basic assumption has been altered, and if so, upon what rationale the alteration is based.

A subsequent case which at first blush would appear to refute the implicit holding and profuse dicta of the *Patterson* case and its precursor, the *Union Pacific* case, is *Arthur v. Kraft-Phenix Cheese Corporation*.<sup>50</sup> Here, a private action was brought against a corporation under section 4 of the Clayton Act to recover treble damages for violation of the anti-trust laws.<sup>51</sup> A demurrer was sustained to the declaration on the ground that the alleged conspiracy was not shown to affect interstate commerce, that "public interests were not involved, as required in the case of a valid suit under the Sherman Act," and that the declaration was duplicitous.<sup>52</sup>

Upon amendment of the complaint, the court was faced with a complaint which charged that wrongful acts had been committed in that the defendant corporation had conspired "with one of its officers and two of its general sales managers . . . to force the plaintiff out of . . . business in

<sup>49</sup>The defendants had requested that the jury be charged that it was not unlawful for them to have required their agents to report the names of persons who had purchased machines from competitors, and to secure samples of competitors machines; to sell machines to parties who had purchased competitors machines by making exchange offers; and to make comparative demonstrations of the merits of their machines. The court stated that: "No objection can be made to the last proposition, but the other two are too broad. They need qualification. It was unlawful for defendants to do as stated in the second proposition, if the doing thereof involved the purchaser and owner of the competing cash register breaking his contract with the competitor in any particular, or was done for the purpose of driving the competitor out of the cash register field. . . ."

"Then, as to reporting purchasers of competing registers and securing samples, it all depends on the manner in which the information in the one instance and the samples in the other were obtained or secured. *If in a proper manner*, nothing unlawful was done." 222 Fed. at 650. (Emphasis added.)

<sup>50</sup>26 F. Supp. 824 (D. Md. 1938).

<sup>51</sup>"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides, or is found, or has an agent, without respect to the amount in controversy and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15 (1958).

<sup>52</sup>26 F. Supp. at 826. The original complaint had alleged violations of both the Sherman Act and of section 2 of the Clayton Act (price discrimination). 15 U.S.C. § 13 (1958). However, the declaration under section 2 of the Clayton Act was framed under the pre-1936 Robinson-Patman Act amendment in 49 Stat. 1926 (1936). "Taken as a whole, the declaration discloses only what seems to be a private controversy rather than one affecting the public as such. It is well established that the principal purpose in enacting the Antitrust Laws . . . was to protect the public; and the right of an individual to sue for personal damages sustained is incidental and subordinate." 26 F. Supp. at 825. And see note 96 *infra* for further comment on the attitude of the courts as to private action suits.

the defendant's . . . products. . . .<sup>53a</sup> The specific facts alleged were that defendant corporation had demanded that plaintiff either buy the business of a competitor or sell his business to said competitor. Upon his refusal to do either, defendant corporation refused to sell further goods to plaintiff at a dealer's discount.<sup>54</sup> The court, in assuming that such action of the defendant was arbitrary and unreasonable, nonetheless held that "nothing more appears in the present amended declaration than in substance appeared in the original declaration. . . . Essentially what is complained of is a private wrong or common law tort in which the public interest is not involved. . . . The Sherman Act is, therefore, clearly not really involved."<sup>55</sup>

However, after dealing with the problem as to whether the conduct involved was violative of the Act by its nature, the court dealt briefly with the means by which it was accomplished. In pointing out that there was no combination or conspiracy alleged between two or more manufacturers the court seemingly implied that *there could be no such conspiracy* as was anticipated in the *Patterson* case.<sup>56</sup> Yet it is uncertain whether this observation was based upon such a supposition, or whether it merely recognized that the nature of the conduct would thereby be altered to create the substantive offense. But the position of the court is clarified when, after pointing out that the conspiracy involved a rather unusual group, that the agents had not been joined and that no motives had actuated the agents, it asserts that:<sup>57</sup>

If they had improper personal motives and combined to carry them out through the medium of the defendant corporation to the prejudice of the plaintiff, *it is conceivable that a common law tort suit might lie against them*; but it is difficult to see how that would constitute either restraint of trade or monopoly of trade *on the part of the defendant corporation*. (Emphasis added.)

Although it appears that the language could be taken to mean that officers can not be held liable for a conspiracy it should be borne in mind that the language should be limited to the facts of the case. As seen above it is apparent that the court, though failing to clearly distinguish between

<sup>53a</sup>26 F. Supp. at 827. Interestingly enough, the declaration also contained counts based on the attempt and monopolization portions of section 2 and section 2 of the Clayton Act. Concededly the court was convinced that there was no unreasonable conduct involved in the case, or those sections could have been facilitated.

<sup>54</sup>26 F. Supp. at 827.

<sup>55</sup>*Id.* at 828. The court said that "it is legally quite impossible to understand how the public interest could be concerned in this individual private controversy. There is nothing in the alleged facts to show that the *motive* of the defendant was to restrain trade or to lessen competition and certainly nothing to show that the alleged unreasonable demand on the plaintiff could possible have the effect of lessening competition, or of raising prices or even maintaining prices." *Ibid.* (Emphasis added). But compare the language of Justice Black in *Klor's Inc. v. Broadway-Hale Stores*, 359 U.S. 207, 213 (1959), wherein he stated that conduct "is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy."

<sup>56</sup>"The conspirators here named are a rather unusual group with respect to restraint or monopoly of trade as the conspiracy was said to be between the defendant corporation and its agents, and one Cappel, another local retail dealer." 26 F. Supp. at 829. Obviously, if the conduct had been sufficiently aggravated, the presence of the "outsider" would have satisfied the requirement of duality.

<sup>57</sup>26 F. Supp. at 830.

the two, indicated that an unreasonable restraint had not been imposed.<sup>58</sup> Further, the action was against the defendant corporation rather than against the individual officers. As discussed *infra* this may make a difference in the ultimate outcome on conceptual distinctions.<sup>59</sup>

*White Bear Theatre Corp. v. State Theatre Corp.*<sup>60</sup> was the second case which the Attorney General's Committee dismissed as being sustainable upon grounds other than Section 1. This position would appear either to understate the case, as with *Patterson*, or to overstate the case, depending upon one's interpretation of the result. Thus the Committee's statement, that "*despite the holding in . . . White Bear under Section 1, plaintiffs . . . charged violations of Section 2, thus making unnecessary to the result the brief discussion of the applicability of section 1 to these facts*"<sup>61</sup> seems to be based upon an error of generalization, if not of fact.

The only *holding* under section 1 was that that section would not be considered. The court, pointing out that the plaintiff relied upon section 1 as well as section 2 stated that in the view they took of the case "it is unnecessary to engage in a separate discussion of this provision."<sup>62</sup>

Hence, there was no holding or discussion in *White Bear* as to the applicability of section 1 to a conspiracy involving the conduct of officers of a corporation acting in its behalf. In this sense it would appear that the Committee Report overstated the case. Since no section 1 question was dealt with it need not be explained away to support a contention that section 1 is not violated by intra-corporate conduct.

However, the case may be understated in that the court considered the question to be "whether the monopoly, which plaintiffs' evidence showed that defendants had *conspired* and *attempted* to establish, was one which fell within the operation of section 2 of the Sherman Act."<sup>63</sup> (Emphasis added.) If it is recalled that the conspiracy portion of section 2 raises the same problems as to intra-corporate activity as does section 1, it becomes apparent that the court's interpretation of the question under section 2 involves the same problems as though it were considered under section 1.<sup>64</sup> In fact, in stating that it would be unnecessary to consider the section 1 charge, the court stressed that "the two sections overlap in the sense that a monopoly under Section 2 is a species of restraint of trade under Section 1."<sup>65</sup>

<sup>58</sup>"There is nothing in the single set of facts here alleged from which there could be any reasonable inference that the defendant corporation was endeavoring to restrain or monopolize trade in these products." 26 F. Supp. at 830. And see note 55 *supra*, where the court expressly finds that neither *motive* nor *effect* were present in this case. "The question of the application of the [Sherman Act] is one of intent and effect." *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 361 (1933).

<sup>59</sup>But see note 161 *infra*.

<sup>60</sup>129 F.2d 600 (8th Cir. 1942).

<sup>61</sup>COMMITTEE REPORT 31.

<sup>62</sup>129 F.2d at 602 n.3. The trial court had directed a verdict for defendant after plaintiff's evidence on the ground that the "public interest" had not been shown. 129 F.2d at 602.

<sup>63</sup>*Id.* at 602. That is, the plaintiff based his claim under section 2 on both the *conspiracy* and the *attempt* provision.

<sup>64</sup>The court itself observes that "Section 1, of course, embodies a legally distinct wrong or offense from § 2, but 'the two sections overlap in the sense that a monopoly under § 2 is a species of restraint of trade under § 1.' *United States v. Socony-Vacuum Oil* 310 U.S. 150, 226 footnote 59." 129 F.2d at 602 n.3.

<sup>65</sup>*Ibid.*

Concededly, the court was considering not only a *conspiracy* charge but an *attempt* charge as well. Beyond a doubt, the reversal of the lower court's directed verdict for the defendant could be justified upon the ground that a monopoly had been *attempted*, which does not require a plurality of actors. Yet, a consideration of the language of the case clearly indicates that the defendants, being a single corporation and the owner and officers thereof, were considered by the court as being legally capable of *conspiring* to monopolize. Thus the court stated that "on plaintiffs evidence, there *was a conspiracy* and an attempt to monopolize the 'first-run' films of the interstate market. . . ."<sup>68</sup> Also "while plaintiffs *evidence of conspiracy clearly was sufficient to go to the jury* as against defendants State Theatre Corporation, Jensen and Albrecht, it is doubtful if it sufficiently showed joinder or participation in the conspiracy or attempted monopoly by defendant Naas, who appears to have been wholly inactive in the business."<sup>69</sup> (Emphasis added.)

The holding of the court, then, was not based upon section 1 at all, but was based upon both the conspiracy and attempt aspects of section 2. Even though it be conceded that the attempt charge alone would have been sufficient it is equally apparent that in the eyes of the court the conspiracy charge likewise would have been sufficient unto itself. Since the court made no effort to separate the two elements and the defendants apparently failed to plead the single corporate entity defense, there seems little justification to reject one leg of the courts holding merely because another leg would sustain the result.<sup>70</sup>

In the cases previously considered the direct question as to whether intra-corporate conduct could violate section 1 of the Sherman Act was not passed upon. Yet, in some at least, there seemed to be an underlying assumption that such a violation was possible.<sup>71</sup> In *United States v. Lorain Journal Co.*,<sup>72</sup> the question was squarely presented to the court. A civil action was filed against defendant corporation and several officers of that corporation seeking to enjoin them from continuing to engage in certain acts in furtherance of an alleged combination and conspiracy in restraint of trade violative of section 1, and an alleged conspiracy and attempt to monopolize in violation of section 2, of the Sherman Act.<sup>73</sup> The district court, unlike the *White Bear* court, separated the attempt and conspiracy

<sup>68</sup>129 F.2d at 604 (Emphasis supplied.)

<sup>69</sup>*Id.* at 606. And compare the similar position taken by the *Patterson* court as set forth in note 43 *supra*, as to the non-liability on the part of those inactive members of the corporation.

<sup>70</sup>The court did state that: "The attempts of defendants to monopolize the 'first-run' films in commerce, for the purpose of putting plaintiff out of the motion picture theatre business at White Bear Lake, must consequently, on plaintiff's evidence, be held to have presented a case for the jury, under the Sherman Act." 129 F.2d at 605. Though having reached this result made it unnecessary to carefully consider the charge as to conspiracy, the fact that it was considered indicates that it was thought to have posed no special problem once it was decided that the conduct complained of was carried out with the "intent" of driving the plaintiff out of business and with the "effect" of depriving the population of White Bear of the opportunity to see a substantial number of films.

<sup>71</sup>*E.g.*, *Patterson v. United States*, 222 Fed. 599 (6th Cir. 1915).

<sup>72</sup>92 F. Supp. 794 (N.D. Ohio 1950).

<sup>73</sup>*Id.* at 795-96. This action was based upon section 4 of the Sherman Act, 15 U.S.C. § 4 (1958) which gives power to the district courts to enjoin conduct violating the antitrust laws.

aspects of the section 2 charge and found that the defendants had attempted to monopolize in spite of their contention that interstate commerce was not involved.<sup>72</sup>

As to the charges dealing with conspiracy the court held that:<sup>73</sup>

The remaining charges of conspiracy to restrain and to monopolize pose a problem to which a great deal of attention has been devoted by both the Government and defendants: namely, *whether a conspiracy within the meaning of the Sherman Act can be found to exist between and among a single corporation and the officers and employees who act for it.* For the defendants argue that the "conspiracy" here is the formulation of business policy for a single enterprise. (Emphasis added.)

After pointing out that the problem is not presented in connection with the attempted monopolization, the court set forth the arguments of the respective parties.

The defendants asserted that the individual corporation has at its disposal only so much strength, which remains the same whether it is exercised by one or more officers. And furthermore "the conspiracy sections of the Sherman Act were designed to strike only at those situations where the economic power exerted has been enhanced by a confederacy of otherwise independent business enterprises and not where coercive restraints are attempted or accomplished by a so-called 'single trader.'"<sup>74</sup>

In opposition to the position of the defendant, the government asserted that the language of the Sherman Act should receive as liberal an interpretation as had other conspiracy statutes, and that the cases stressed the character of the restraint rather than the economic relationships of "the offending conspirators."<sup>75</sup>

Pointing out that the *monopoly attempt* was proscribed by the Sherman Act, the court disposed of a difficult problem as follows:<sup>76</sup>

The relief to be granted for that violation of law should terminate all the abuses in which the defendants indulged. This renders the solution of the controversy in respect of the charges of conspiracy of *mere academic interest*, and make its determination unnecessary in this instance. (Emphasis added.)

On appeal to the Supreme Court,<sup>77</sup> that body pointed out that the complaint had alleged that defendant corporation and four of its officers were engaged in a combination and conspiracy in restraint of trade and to monopolize as well as attempting to monopolize. The intra-corporate problem was but alluded to in their statement that the district court had found the

<sup>72</sup>"The defendants do not in effect deny that they have attempted to monopolize, but they seek to avoid the ban of the Sherman Act on the ground that only a local monopoly and not a monopoly of interstate commerce was sought." 92 F. Supp. at 798. But the court stated that: "Local monopolies are proscribed by the Act where they are achieved or sought by restraint of interstate commerce." *Ibid.*

<sup>73</sup>92 F. Supp. at 799.

<sup>74</sup>*Id.* at 800.

<sup>75</sup>*Ibid.*

<sup>76</sup>*Ibid.*

<sup>77</sup>*Lorain Journal Co. v. United States*, 342 U.S. 143 (1951).



parties guilty of an attempt to monopolize and had "confin[ed] itself to that issue."<sup>78</sup>

In *United States v. Times-Picayune*,<sup>79</sup> the government again brought an action against a corporation and four of its officers alleging that:<sup>80</sup>

- a) the defendant corporation had entered into *contracts with advertisers* which violated Section 1 of the Act;
- b) the defendants were *combining and conspiring* in unreasonable restraint of trade in violation of Section 1; and
- c) the defendants were *combining and conspiring* to monopolize and *attempting to monopolize* in violation of Section 2 of the Sherman Act.

For reasons not set forth by the court, but which may be apparent to clear thinkers such as those composing the Attorney General's National Committee, the government, in its brief filed after trial, urged only that the defendants had contracted in restraint of trade and attempted to create a monopoly. "The allegations that defendants conspired among themselves in violation of Sections 1 and 2 of the Act were not urged, and must be considered as having been abandoned."<sup>81</sup> On appeal to the Supreme Court by defendants, who were found guilty of the contract and attempt charges, a limited consideration was made to the intra-corporate conspiracy problem.<sup>82</sup>

Perhaps the case which takes the most stringent view against the possibility of an intra-corporate conspiracy is *Nelson Radio & Supply Co. v. Motorola, Inc.*<sup>83</sup> An action was brought against Motorola to recover treble damages for violation of the anti-trust laws. Plaintiff's amended complaint alleged that defendant had terminated plaintiff's distributorship with defendant because of plaintiff's refusal to agree to certain conditions. While plaintiff's agreement included the right to sell much of Motorola's equipment, it did not include the right to sell communications equipment. Motorola refused to grant plaintiff the latter right and further informed plaintiff that his continued selling of such equipment obtained from other sources would result in a non-renewal of his contract. Such an eventuality resulted

<sup>78</sup>*Id.* at 145.

<sup>79</sup>105 F. Supp. 670 (E.D. La. 1952).

<sup>80</sup>*Id.* at 671-72.

<sup>81</sup>*Id.* at 672.

<sup>82</sup>*Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953). After determining that neither the effects nor the aim of monopoly had been established and that accordingly the judgment must be reversed unless other factors could bring the case within the proscribed areas, the Court stated: "*Colgate's* principle protects the Times-Picayune Publishing Company's simple refusal to sell advertising space in the Times-Picayune or States separately *unless other factors destroy the limited dispensation which that case confers.*"

"In our view, however, no additional circumstances bring this case within § 1. Though operating two constituent newspapers, the Times-Picayune is a single corporation, and the Government in the District Court abandoned a charge of unlawful concert among the corporate officers. With the advertising contracts in this proceeding viewed as in themselves lawful and no further elements of combination apparent in the case, § 2 criteria must become dispositive here." 345 U.S. at 626. As to what additional elements may suffice to bring the case within section 1, see *Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922) and note 287 *infra*.

<sup>83</sup>200 F.2d 911 (5th Cir. 1952).

and the plaintiff alleged *inter alia* that the defendant and certain of its officers had engaged in a conspiracy in violations of section 1 of the Sherman Act.<sup>84</sup>

In sustaining a dismissal of the complaint as failing to state a cause of action, the majority first asserted that in pleading a conspiracy a general allegation is but an allegation of a legal conclusion, and that to state a cause of action a statement of the facts constituting the conspiracy to restrain trade must be set forth.<sup>85</sup> But the court further asserted that a "more fundamental defect" was present:<sup>86</sup>

It is basic in the law of conspiracy that you must have two persons or entities to have a conspiracy. *A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation.* Here it is alleged that the conspiracy existed between the defendant corporation [and certain officers] who have been actively engaged in the management, direction and control of the affairs and business of defendant. *This is certainly a unique group of conspirators.* The officers, agents and employees are not named as defendants and no explanation is given of their non-joinder. Nor is it alleged affirmatively, expressly or otherwise, that these [individuals] were actuated by any motives personal to themselves. Obviously they were acting only for the defendant corporation. (Emphasis added.)

After discussing certain situations where a corporation may be held liable (and which have been or will be discussed)<sup>87</sup> the court continues by stating that:<sup>88</sup>

... it appears plain to us that the conspiracy upon which the plaintiff relies consists simply in the absurd assertion that the defendant, through its officers and agents, conspired with itself to restrain its trade in its own products.

The court then correctly points out that official determination of the price, quantity and quality of goods and the type of customers or market to be served:<sup>89</sup>

<sup>84</sup>*Id.* at 913. The nexus of the charge was that defendants had advised the plaintiff that they would refuse to sell to him if he sold the goods of others, and that they did so refuse when he went against their wishes.

<sup>85</sup>200 F.2d at 913-14. Clearly, on the facts alleged, this case would satisfy the *Colgate* principle as enunciated in note 82 *supra*.

<sup>86</sup>200 F.2d at 914.

<sup>87</sup>*E.g.*, "And of course, a corporation and its subsidiaries can be guilty of a conspiracy in restraint of trade but that involves separate corporated entities." *Ibid.* 200 F.2d at 214.

<sup>88</sup>*Ibid.* However, it should be noted that the concept of "rights" is not absolute. If the officers are causing the corporation to go beyond its rights, a different question is presented, and it is submitted that the corporation goes beyond its rights when it attempts to unreasonably restrain trade. "But the word 'right' is one of the most deceptive of pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion. Most rights are qualified." *American Bank & Trust Co. v. Federal Reserve Bank*, 256 U.S. 350, 358 (1921). To say that anything which it can do within its corporate shell is not an unreasonable restraint of trade would be to make a rather large assumption; but better that such an assumption be indulged than that *even assuming unreasonable conduct* the courts are powerless to prevent it because of a conceptual difficulty. See *Beacon Fruit & Produce Co. v. Harris & Co.*, 152 F. Supp. 702 (D. Mass. 1957), discussed at notes 124 and 176 *infra*, which points out one possible exception to the *Nelson* "rule."

... do not result in the corporation being engaged in a conspiracy in unlawful restraint of trade under the Sherman Act. Plaintiff can come within the meaning of section 1 of the Act only by claiming the existence of a conspiracy *but no conspiracy could possibly exist under the facts disclosed*. The Acts does not purport to cover a conspiracy which consists merely in the fact that the officers of the single defendant corporation did their day to day jobs in formulating and carrying out its managerial policy. . . . *It does not violate the Act when it exercises its rights through its officers and agents*, which is the only medium through which it can possibly act. (Emphasis added.)

In continuing, the court made the astute observation that the plaintiff in naming the officers was trying to avail itself of the doctrine that what is not illegal for a corporation to do alone becomes illegal if done as part of a conspiracy.<sup>90</sup> This attempt is thwarted by a citation from *Kraft-Phenix*<sup>91</sup> which is as vague out of context as it was in its original setting.<sup>92</sup> Finally, "in the absence of any allegation whatever to indicate that the agents of the corporation were acting in other than their normal capacities, plaintiff has failed to state a cause of action based on conspiracy under Section 1 of the Act."<sup>93</sup>

In addition to the allegations based upon section 1 of the Sherman Act, the plaintiff alleged violations of section 3 of the Clayton Act.<sup>94</sup> Before dealing with the treatment of the issues by the dissenting judge, it should be clear that the apparent ground upon which the majority rejected the section 3 claim was that that section covers only leases, sales, or contracts actually made on the prohibited conditions. In the instant case it was the absence of a contract which was being complained of.<sup>95</sup>

Hence it would appear that Judge Rives's dissent is aimed at the acceptance of the intra-corporate defense rather than the technical defense against the alleged Clayton Act violation. Thus he asserts that a scheme has been devised by which defendant's dealers have been coerced into entering into contracts in restraint of trade in clear violation of section 3 of the Clayton Act.<sup>96</sup> Since plaintiff is a stranger to these contracts he cannot

<sup>90</sup>But this leaves unanswered the question of whether the conduct of the corporation is legal. It might also be said that the plaintiffs were simply hopeful of striking down what they considered to be an unreasonable restraint of trade by a means which the Congress had provided.

<sup>91</sup>*Arthur v. Kraft-Phenix Cheese Corporation*, 26 F. Supp. 824 (D. Md. 1937), discussed at note 50, *supra*.

<sup>92</sup>Judge Chesnut had therein stated that "... the inclusion of the defendant's agents in the alleged conspiracy would seem to be only the basis for a technical rather than a substantial charge of conspiracy because obviously the agents were acting only for the defendant corporation." 26 F. Supp. at 830, cited by the instant court at 200 F.2d at 914.

<sup>93</sup>200 F.2d at 914. What result if they had been acting in other than their "normal capacities"? See note 155, *infra*.

<sup>94</sup>15 U.S.C. § 14 (1958). This section condemns tying restrictions and exclusive arrangements under stated circumstances.

<sup>95</sup>200 F.2d at 915. "It is the absence of a contract with the plaintiff, not the presence of agreements with distributors in other parts of the country, of which the plaintiff must complain." *Ibid*. "There is a real difference between the act of refusing to deal and the execution of a contract which prevents a person from dealing with another." 200 F.2d at 915-16.

<sup>96</sup>*Ibid*. If plaintiff had signed the requested agreement there would seem to be little doubt that a violation of section 3 could be found. Compare *Standard Oil Company v. United States*, 337 U.S. 293 (1949). Though it may seem that this same

recover since not affected and he can not recover under section 1 of the Sherman Act because "... the scheme was concocted under the cloak of immunity of a single corporate entity. At long last a method has been found to flout the purposes of the anti-trust laws and to deny the victims any recourse to the courts. I cannot agree."<sup>107</sup>

Implicit in Rives's dissent is the concept that the defendant and its officers by entering into contracts in restraint of trade are likewise conspiring in restraint of trade and so should be reached under section 1 of the Sherman Act if the restraint is found to be unreasonable.<sup>108</sup> As he states:<sup>109</sup>

It seems to me that whether the functions are performed by separate corporations or by a single entity is purely a matter of convenience to be exercised under state law and that the incidence and effect of the federal anti-trust laws should be the same no matter what form the transactions take.

The persuasiveness of the majority in *Nelson* is demonstrated by cases subsequently decided. For instance, in *Marion County Co-op Ass'n v. Carnation Company*,<sup>100</sup> it was alleged that defendant corporation violated sections 1 and 2 of the Sherman Act by maintaining a plan and scheme to maintain a "fictitious" price for milk. The court felt that the defendant's contention that the complaint did not state a cause of action within section 1 or the conspiracy portion of section 2 was well founded.<sup>101</sup>

In striking down the contention of plaintiff that there may be a conspiracy between the officers and agents of a corporation and the corporation itself, the court stated that "the cases uniformly hold that a conspiracy cannot exist between a corporation and its officers and agents. Perhaps the clearest holding on this point is the case of *Nelson*. . . ."<sup>102</sup> Quoting much of the language from the *Nelson* case as well as that of Justice Jackson's dissent in the *Timken*<sup>103</sup> case and citing many cases not pertinent to the point<sup>104</sup> the court concluded that:<sup>105</sup>

violation existed because of the presence of such contracts in the agreements with other dealers, the courts have shown an apparent reluctance to permit a private party to maintain an action even though there has been a public wrong. See *e.g.*, *Klein v. Lionel Corp.*, 237 F.2d 13 (3rd Cir. 1956). And see *Goldlawr, Inc. v. Schubert*, 169 F. Supp. 677, 691 (1958).

<sup>107</sup>200 F.2d at 916.

<sup>108</sup>Judge Rives cites the following language from the opinion of Chief Justice White in *United States v. American Tobacco Co.*, 221 U.S. 106, 180 (1910): "All the difficulties suggested because of the mere form in which the assailed transactions are clothed become of no moment. This follows because . . . the generic designation of the 1st and 2nd sections of the law, when taken together embraced every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which such acts were clothed."

<sup>109</sup>200 F.2d at 916.

<sup>100</sup>114 F. Supp. 58 (W.D. Ark. 1953).

<sup>101</sup>*Id.* at 61.

<sup>102</sup>*Id.* at 62.

<sup>103</sup>*Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 606 (1951). See note 257 *infra* and accompanying text.

<sup>104</sup>*E.g.*, the *Times-Picayune* and *Lorain Journal* cases, discussed *supra* notes 78 and 82.

<sup>105</sup>Again the language of this court, as the *Nelson* court, falls from the general proscription to a qualified holding. Here the court had previously stated that "the cases uniformly hold that a conspiracy cannot exist between a corporation and its officers and agents." 114 F. Supp. at 62. (Emphasis added.) No case cited has so held, in spite of language to that effect.

The above quoted authorities completely refute plaintiffs' contention and *establish beyond doubt* the principle that a violation of section 1 and the conspiracy portion of section 2 of the Sherman Act cannot be committed by a corporation and its officers and agents *when said officers and agents are acting for the corporation in the ordinary scope of their duties.* (Emphasis added.)

The court then concluded that the plaintiff made no intimation that the officers were acting in other than their normal capacities. Since the court ultimately found that "the defendant . . . has shown conclusively that defendant's payments for raw milk were substantially the same as its competitors in the area,"<sup>106</sup> it is indeed true that the officers were acting in their normal capacities. Whether the plaintiff had intimated they were not is open to question.

On appeal from the granting of a summary judgment for defendant,<sup>107</sup> the court noted that the plaintiff, in his Statement of Points, assigned as error the district court's ruling on the intra-corporate conspiracy aspect of the case. However, they concluded that plaintiff had abandoned the point since appellant's brief stated:<sup>108</sup>

We do not perceive the necessity of briefing the conspiracy theory of our Complaint for the reason that if the ruling of the District Court were set aside by this Court, the ultimate relief that would be obtained by the appellant would be the same whether the complaint is predicated on Sections 1 and 2 of the Sherman Act or Section 2 alone.

Here we have a reflection of the caution which may have prompted government counsel in the *Times-Picayune* case.<sup>109</sup> Reserving the question as to whether this is the only sane course to pursue, it should at least be noted that the rationale of counsel in the instant case is only partially justified. It is true that if the appeal failed to establish the fact that a "fictitious" price had been established, as was in fact the case, the question as to the intra-corporate problem would have been moot since no unreasonable restraint of trade would have existed.<sup>110</sup> However, if they had prevailed upon this point and in fact a fictitious price had been established, it is possible that even though a monopoly or an attempt to monopolize could not be found, yet an unreasonable restraint of trade could be found if the intra-corporate defense were not to prevail.<sup>111</sup>

In *Brehm v. Goebel Brewing Company*,<sup>112</sup> the defendant entered a motion to strike designated parts from the complaint. Among these was the third sentence of the eleventh paragraph which read:<sup>113</sup>

The officers and employees of defendant conspired to bring about cancellation of all written contracts of distributorship and also con-

<sup>106</sup>114 F. Supp. at 68.

<sup>107</sup>*Marion County Cooperative Ass'n v. Carnation Co.*, 214 F.2d 557 (8th Cir. 1954).

<sup>108</sup>*Id.* at 559.

<sup>109</sup>*Supra* at note 81.

<sup>110</sup>That is, the parties would have been operating within their "rights," and hence protected by the fact limited holding of the *Nelson* case.

<sup>111</sup>*Cf.*, *United States v. Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150, 226 n.59 (1940).

<sup>112</sup>*Trade Cases* ¶ 67,431 (W.D. Mich. 1953).

<sup>113</sup>1953 *Trade Cases* at ¶ 68,161.

spired to compel and coerce licensees and distributors having written distributorship contracts and oral contracts from only wholesaling beers that were not competitors. . . .

In sustaining the defendant's motion to strike the allegation, the court stated:<sup>114</sup>

*I think it is clear that officers and employees of the defendant corporation could not conspire with themselves. If the acts of such officers and employees were within the scope of their employment, their acts and doings would be those of the corporation, and, of course, if their acts and doings were outside of the scope of their employment, the defendant corporation would not be bound. (Emphasis added.)*

The defendant also moved that the contention that "the defendant, its officers and agents, have conspired among themselves to bring about the cancellation of all written distributor contracts" be stricken.<sup>115</sup> In dealing with this motion the court reiterated that the acts of the officers within the scope of their duty would be the acts of the corporation, and "it is, of course, elemental that the defendant could not conspire with itself."<sup>116</sup> But recognizing that the word "agents" probably referred to the distributing agents of defendant's products, the court struck only the words "its officers."<sup>117</sup>

Another case which relied upon *Nelson* is *Goldlawr, Inc. v. Schubert*<sup>118</sup> involving the dismissal of a third party complaint which alleged that one Goldman had conspired with his corporation, Goldman Theatres Inc., in violation of the antitrust laws, to prevent plaintiff from showing first-run movies. The complaint was dismissed on the ground that Goldman could "not conspire with itself, i.e., its officers, agents, and employees."<sup>119</sup> The appellant, citing *Timken*,<sup>120</sup> *Kiefer-Stewart*,<sup>121</sup> and *Yellow Cab*<sup>122</sup> urged that the fact that Goldman was the only shareholder of Goldman Theatres Inc. should differentiate the case from *Nelson*. However, the court felt that this difference did not "impinge" on the "fundamental rule" of the "sound holding" of *Nelson*. "In these three decisions there were separate corporate conspirators. Here there is one, acting through its proper agent."<sup>123</sup>

<sup>114</sup>*Ibid.* "Of course it is familiar law that a substantive offense committed by a corporate employee in the scope of his employment will be imputed to the corporation, but it remains to be decided whether the fact that the corporate employee may have acted in concert with other individuals in the commission of the substantive offense will similarly by imputation implicate the corporation in the conspiracy. This may be a valid theory, but at least it is novel enough to have called for a citation of authorities. . . . It may be that the assent of some agent in supervisory or executive authority would be necessary to commit a corporation to a conspiracy." *United States v. Thompson-Powell Drilling Co.*, 196 F. Supp. 571, 578 (N.D. Tex. 1961).

<sup>115</sup>1953 Trade Cases at ¶ 68,161.

<sup>116</sup>*Ibid.*

<sup>117</sup>*Ibid.*

<sup>118</sup>276 F.2d 614 (3rd Cir. 1960).

<sup>119</sup>*Id.* at 617.

<sup>120</sup>*Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951). See note 257, *infra*.

<sup>121</sup>*Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951). See note 244 *infra*.

<sup>122</sup>*United States v. Yellow Cab Co.*, 332 U.S. 218 (1947). See note 238 *infra*.

<sup>123</sup>276 F.2d at 617.

Before proceeding with a treatment of the broader intra-enterprise problem suggested by the preceding case, it may be well to reconstruct the present position of the law insofar as the more narrow intra-corporate phase is concerned.<sup>124</sup> To begin with, a clear statement of the specific problem to be resolved should be re-expressed. The *intra-corporate* conspiracy concept would urge that in certain instances a violation of section 1 or of the conspiracy portion of section 2 may be based upon the conduct of corporate officers acting among themselves in behalf of said corporation. In summarizing the logical and empirical support for and against such a violation the variations in which the problem can be raised should be clearly outlined.

Starting with the basic premises that a conspiracy requires two or more participants, and that a corporation can never act for itself but must rely upon agents,<sup>125</sup> the cases dealing with the problem can be placed in the following categories. First, an action may be brought alleging that the corporation combined or conspired *with* a single officer or shareholder in violation of section 1 of the Sherman Act.<sup>126</sup> Secondly, an action may be brought alleging a conspiracy in restraint of trade because of the intra-corporate conduct of two or more of the corporation officers.<sup>127</sup>

Of course, each category includes three possible actions, *i.e.*, against the corporation, against the officer(s) or shareholder(s), or against both.

It is apparent that since two or more persons are required to conspire and since a corporation can never act for itself, any action based upon the conduct of a single officer or shareholder is doomed to failure if its sole basis is a conspiracy allegation under sections 1 or 2 of the Sherman Act. If there is only one active participant, as was the case in *Union Pacific*

<sup>124</sup>Recent opinions which have been handed down have relied heavily on the *Nelson* "rule." *E.g.*, *Warner & Co. v. Black & Decker Manufacturing Co.*, 167 F. Supp. 860 (1958), wherein the plaintiff had charged a conspiracy "on the part of the corporate defendant, its New York Manager, and certain of its distributors who are not named." *Id.* at 861-62. The court, citing *Nelson*, stated "that the corporate defendant could not conspire with its own Manager, acting within the scope of his authority has been decided." Of course, the case which really decided this question was *Union Pacific Coal*, note 18 *supra*, and there need be no qualification of "scope of authority" since it makes no difference in what sphere he acts, if he acts alone. See note 24 *supra*. The case of *Poller v. Columbia Broadcasting System, Inc.*, 284 F.2d 599 (D.C. Cir. 1960), involved a situation in which the plaintiff alleged that C.B.S. had conspired with others to acquire his station at a price below its actual value. The court cited *Nelson* in asserting that "Pollar's charge that CBS conspired with one of its unincorporated divisions and two of its employees is obviously unsound. It is in reality a charge that CBS conspired with itself." *Id.* at 603. "We conclude that CBS, its unincorporated division, and its employees were incapable of conspiring to restrain trade or commerce." *Ibid.* However, these comments are gratuitous since the court again found that the actions complained of were within the legal rights of the defendant. *Ibid.* See note 2 *supra*, where the results of this case on appeal to the Supreme Court are discussed. And see *Beacon Fruit & Produce Co. Inc., v. Harris & Co., Inc.*, 152 F. Supp. 702 (D. Mass. 1957), where the defendant argued "that there can be no conspiracy among these defendants since they are a corporation and its principal officers and directors. It is generally true that the acts of the agents of a corporation in carrying out their duties of formulating the policy of the corporation do not constitute a conspiracy violative of § 1 of the Act (citing *Nelson*). But plaintiffs do not rely merely on this, but claim they can prove that in fact the individual defendants here conspired to form the defendant corporation as a mere instrumentality to take over the partnership business as a step in securing control of the market and imposing a restraint of trade for their individual benefit. The validity of this contention depends on proof of facts which defendants' do not concede." *Id.* at 704.05.

<sup>125</sup>See note 6 *supra*.

<sup>126</sup>*Cf.*, *Union Pacific Coal Co. v. United States*, 173 Fed. 737 (8th Cir. 1909).

<sup>127</sup>*E.g.*, *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911 (5th Cir. 1952).

*Coal Co.*<sup>128</sup> and in *Goldlawr*,<sup>129</sup> the naming of the corporation as a second party is a boot-strap fiction, since its only action was that performed by its officer or shareholder.<sup>130</sup>

Hence, regardless of whether the action is brought against the corporation, the officer or shareholder, or both, the only possible result upon grounds of both logic and precedent, is that a violation of the conspiracy portions of the Sherman Act can not exist. As has been stated, "... the conscious participation in the scheme of two or more minds, is indispensable to an unlawful combination, and it cannot be created by the action of one man alone."<sup>131</sup>

Yet in those situations in which the conduct of the corporation is carried out by two or more persons, the "indispensable" element of two or more minds is present. The question must now be resolved as to whether that *indispensable* element is *sufficient* to sustain a charge of conspiracy against either the agents or the corporation.<sup>132</sup>

Again I would like to stress the basic premise that a corporation cannot act except through its officers. Therefore, it appears to me that where the Attorney General's Committee and the cases speak of a "*conspiracy solely between a corporation and its officers*" or between its officers acting on its behalf"<sup>133</sup> it is failing to analyze the problem carefully. Since a corporation can not act for itself, but must depend on human agents, it must follow as a corollary that the corporation can not conspire *with* its officers. The corporation *through* its officers may conspire with other parties, such as with another corporation *through* its officers, and the officers of a corporation may conspire *among* themselves on behalf of their corporation, but it is logically impossible for them to conspire *with* their own corporation.<sup>134</sup>

In those situations where it is felt that the officers of a corporation have conspired together on behalf of their corporation, actions have been brought against the agents alone, against the corporation alone, or against the two combined. In view of what has been said as to the impossibility of the corporation itself to conspire except *through* its officers, it is conceivable that a different outcome would result, depending upon who was proceeded against. Thus there would appear to be less of a conceptual difficulty in charging the officers with the conspiracy than in charging the

<sup>128</sup>*Supra* at note 18.

<sup>129</sup>*Supra* at note 118.

<sup>130</sup>To charge the corporation with conspiring as a second participant, as must be the case when only one human agent is involved, is contrary to the basic premise that a corporation cannot act except through its officers. "Although the corporation has legal personality for most purposes, for purposes of determining whether there is a conspiracy the case of an agent and his corporation, when the agent is the sole human actor, seems analogous to that of the trustee and his trust. The corporation seems an inanimate object analogous to a bomb or a trust. Plurality in the context of conspiracy should be viewed as a plurality of human minds, each of which is able to contribute consciously to the furtherance of the conspiracy." *Developments in the Law of Conspiracy*, 72 HARV. L. REV. 920, 952 (1959).

<sup>131</sup>*Union Pacific Coal Co. v. United States*, 173 Fed. 737, 745 (8th Cir. 1909). But see the treatment of the *Walbrook* case at text following note 199 *infra*.

<sup>132</sup>This is assuming, of course, that the conduct sought to be struck down is of an unreasonable nature. See note 98 *supra*.

<sup>133</sup>COMMITTEE REPORT 31.

<sup>134</sup>Though it is conceded that the question may be partially one of semantics, it is none the less asserted that careless use of terms leads to careless analysis. Properly put, the question is whether the corporation can be held as a principal for conspiracies of its officers among themselves on its behalf.



corporation. In the former instance the defense must sustain the burden of proving that "these two trees are one," while in the latter instance the plaintiff must establish that "this is two trees."<sup>135</sup> Before evaluating their respective contentions, a brief recapitulation of the cases dealing with the intra-corporate conspiracy problem will be made.

Of the ten cases previously dealt with, two involved a charge based upon the conduct of a single active participant,<sup>136</sup> while the remaining eight concerned conduct carried out by two or more active participants. Of these eight, in only one instance was the proceeding solely against the agents,<sup>137</sup> three were combined actions against both the corporation and its officers,<sup>138</sup> and the remaining four were brought against the corporation alone.<sup>139</sup>

As previously noted, the first two cases found no liability and logically could not have found otherwise.<sup>140</sup>

In the *Patterson* case,<sup>141</sup> dealing with an action limited to the officers, there was no question raised against the possibility of a conspiracy in violation of section 1 arising from the conduct of officers acting among themselves in behalf of their corporation. However, the case did not consider the liability of the corporation.<sup>142</sup>

Only one of the three cases brought against both the corporation and its officers charging a conspiracy under the Sherman Act for conduct of the officers among themselves in behalf of the corporation actually dealt with the charge, and then only by indirection. Thus in *White Bear*,<sup>143</sup> while the court, contrary to the impression created by the Committee Report, did not consider the section 1 charge, they nonetheless indiscriminately discussed the section 2 charge of both *attempt*, and *conspiracy*, to monopolize, and found liability against all parties except one officer who was not closely enough connected to the activities.<sup>144</sup> Here again, as in *Patterson*, although the result admittedly could have been sustained upon the attempt charge, no one thought to argue that "these two trees are one," as precluding the conspiracy aspect.

The other two cases brought against both the corporation and its officers did not decide the applicability of a conspiracy charge. In *Lorain Journal*,<sup>145</sup> the court first dealt with and found liability under the non-

<sup>135</sup>That is, the burden may be on the defendants to raise the corporate shield as a defense in the former instance, while in the latter the plaintiff will have to pierce the corporate veil to find the "indispensable" element. Yet, it is submitted that the street is either two-way of dead-end.

<sup>136</sup>*I.e.*, *Union Pacific Coal Co. v. United States*, 173 Fed. 737 (8th Cir. 1909); *Goldlawr, Inc. v. Schubert*, 276 F.2d 614 (3rd Cir. 1960).

<sup>137</sup>*I.e.*, *Patterson v. United States*, 222 Fed. 599 (6th Cir. 1915).

<sup>138</sup>*I.e.*, *White Bear Theatre Corporation v. State Theatre Corp.*, 129 F.2d 600 (8th Cir. 1942); *United States v. Lorain Journal*, 92 F. Supp. 794 (N.D. Ohio 1950); *United States v. Times-Picayune Publishing Company*, 105 F. Supp. 670 (E.D. La. 1952).

<sup>139</sup>*I.e.*, *Arthur v. Kraft-Phenix Cheese Corporation*, 26 F. Supp. 824 (D. Md. 1937); *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911 (5th Cir. 1952); *Marion County Cooperative Ass'n v. Carnation Company*, 114 F. Supp. 58 (W.D. Ark. 1953); *Brehm v. Goebel Brewing Company*, Trade Cases, ¶ 67,431 (W.D. Mich. 1953).

<sup>140</sup>See note 130 *supra*, and accompanying text.

<sup>141</sup>*Patterson v. United States*, 222 Fed. 599 (6th Cir. 1915).

<sup>142</sup>*Supra* at note 25.

<sup>143</sup>*White Bear Theatre Corporation v. State Theatre Corporation*, 129 F.2d 600 (8th Cir. 1942).

<sup>144</sup>*Supra* at note 60.

<sup>145</sup>*United States v. Lorain Journal*, 92 F. Supp. 794 (N.D. Ohio 1950).

conspiracy portion of section 2, and so held that a discussion of the intra-corporate conspiracy doctrine would be of mere "academic" interest.<sup>146</sup> The government in *Times-Picayune*,<sup>147</sup> although originally including a conspiracy count in the charges, abandoned that count in its brief at the close of trial, and relied upon third-party contract and attempt to monopolize charges.<sup>148</sup> Whether this abandonment was due to confidence in the sustainability of the other charges, caution in urging an esoteric doctrine, a combination of these, or outright recognition that the thesis of this writer is "absurd," has not been convincingly demonstrated.<sup>149</sup>

Interestingly enough, none of the four cases in which the action was brought solely against the corporation found that intra-corporate conduct could ever be conspiracy under the Sherman Act. As a matter of fact, anything less than a painstaking analysis of them would lead one to infer that the intra-corporate conspiracy concept is precluded by both logic and precedent.<sup>150</sup> In dealing with these cases it is wise to keep in mind the possible distinction between an action against the corporation based upon the conduct of the officers acting in its behalf and an action brought against the officers themselves.<sup>151</sup> It is also essential that the nature of the conduct be evaluated, since only if the conduct is such as to impose an unreasonable restraint on trade is it necessary to determine whether the means of imposing that restraint was by contract, combination, or conspiracy.<sup>152</sup>

The impossibility of an intra-corporate conspiracy was first hinted at in *Kraft-Phenix*<sup>153</sup> in which a refusal to continue giving a dealer's discount to the plaintiff because of his refusal to accede to certain demands was held

<sup>146</sup>*Supra* at note 76.

<sup>147</sup>*United States v. Times-Picayune Publishing Company*, 105 F. Supp. 670 (E.D. La. 1952).

<sup>148</sup>See note 81 *supra* and accompanying text.

<sup>149</sup>Justice Burton did not seem to recognize its asserted asininity, inasmuch as he limited his remarks to the statement that "the complaint alleged that the corporation, together with four of its officials, was engaging in a combination and conspiracy in restraint of interstate commerce in violation of § 1 of the Sherman Antitrust Act, and in a combination and conspiracy to monopolize such commerce in violation of § 2 of the Act, as well as attempting to monopolize such commerce in violation of § 2." *Lorain Journal Co. v. United States*, 342 U.S. 143, 145 (1951). Though he made a later allusion to the possibility of violation of section 1, it seemed to be centered on the type of conduct, rather than on who was carrying it out. See note 82 *supra*.

<sup>150</sup>*E.g.*, "The conspiracy upon which the plaintiff relies consists simply in the absurd assertain that the defendant, through its officers and agents, conspired with itself to restrain its trade in its own products." *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911 (5th Cir. 1952). But see note 134 *supra*. And further, "... the cases uniformly hold that a conspiracy cannot exist between a corporation and its officers and agents." *Marion County Cooperative Ass'n v. Carnation Co.*, 114 F. Supp. 58, 62 (W.D. Ark. 1953). But see note 105 *supra*.

<sup>151</sup>See note 135 *supra*, and see note 161 *infra*.

<sup>152</sup>"In any event, (the) authorities support the proposition that under the Sherman Act it is the character of the restraint that is important; the form by which a prohibited type of restraint is imposed is largely irrelevant." Kramer, *Does Concerted Action Solely Between a Corporation and Its Officers Acting on Its Behalf in Unreasonable Restraint of Interstate Commerce Violate Section 1 of the Sherman Act?* 11 FED. B.J. 130, 139 (1951). *Cf.*, note 98 *supra*. As previously developed, note of the cases which issued the blanket statement that an intra-corporate conspiracy is an impossibility have involved fact situations which have put the question to the test. In all, the court has been dealing with a situation in which the conduct was not considered detrimental to the public interest. See *e.g.*, note 93 *supra* and accompanying text.

<sup>153</sup>*Arthur v. Kraft-Phenix Cheese Corporation*, 26 F. Supp. 824 (D. M. 1937).

not to constitute a cause of action against the corporation. Although it is apparent that the court felt the conduct was not of a nature to constitute an unreasonable restraint of trade, the opinion failed to separate the effects of the end sought from the means used to accomplish such end, and briefly discussed the intra-corporate problem in the light that the plaintiff had charged defendant of conspiring *with* its officers.<sup>154</sup> The court seemed to preclude an action against the officers under the Sherman Act in stating in dicta *that if they were impelled by personal motives a common tax action might lie against them, but such could not be the basis of a Sherman Act violation on the part of the defendant corporation.*<sup>155</sup>

A second case, which, like *Kraft-Phenix*, was an attempt by plaintiff to recover treble damages, is *Nelson Radio & Supply Co.*<sup>156</sup> This case also alleged that defendant corporation conspired *with* its officers in refusing to renew plaintiff's distributorship contract when he refused to accede to their demands.<sup>157</sup> In finding that the complaint failed to state a cause of action, the court went beyond the finding that a statement of facts constituting the conspiracy was not made, and intimated that an intra-corporate conspiracy may be impossible.<sup>158</sup> After expressing the truisms that a conspiracy requires two persons, that a corporation cannot conspire with itself (and it might have added that it cannot conspire *with* its officers)<sup>159</sup> and that the acts of the agent are the acts of the corporation, the court asserted that "this is certainly a unique group of conspirators."<sup>160</sup>

The only portions of the opinion with which one might disagree are those wherein the court attaches great importance to the fact that the officers were not named as defendants, and that echoing *Kraft-Phenix* in pointing out the absence of motives personal to the officers. As to the former, it is difficult to see what significance should attach since the liability of the corporation for the acts of its officers should be determined independently of whether those officers are joined.<sup>161</sup> As to the latter, the view that motive is immaterial would seem preferable, since the law is concerned more

<sup>154</sup>See notes 53-58 *supra* and accompanying text.

<sup>155</sup>This statement should, of course, be limited to the fact situation, in which an unreasonable restraint was not found. If the personal motives of the officers were of a nature to justify an action for unfair competition it is apparent that the corporation could not be held for violating the Sherman Act, but as long as the officers were operating in the interests of the corporation there seems to be little reason why the corporations purse should not pay the price. If one were to strictly apply the "scope of duty" test it would be an unusual situation where an injured person could recover, since no corporation's business is to cause injury.

<sup>156</sup>*Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911 (5th Cir. 1952).

<sup>157</sup>See note 84 *supra* and accompanying text.

<sup>158</sup>See note 89 *supra* and accompanying text.

<sup>159</sup>See note 134 *supra* and accompanying text.

<sup>160</sup>200 F.2d at 914.

<sup>161</sup>If the acts of the officers acting in behalf of the corporation is a violation of section 1 of the Sherman Act, there should be no reason for not imputing this guilt to the corporation whether the private parties are joined or not; therefore the mere fact that they are not joined should not be given any weight in determining whether they have so violated the Sherman Act. Indeed, recent authority indicates that if the officers are accused in their representative capacity they must be charged under section 14 of the Clayton Act, 15 U.S.C. § 24 (1958), and not under section 1 of the Sherman Act. See *United States v. Milk Distributors Ass'n*, 200 F. Supp. 792 (D. Md. 1961), noted in 46 MICH. L. REV. 631 (1962). For a general consideration of this and similar problems see Whiting, *Antitrust and the Corporate Executive*, 47 VA. L. REV. 929 (1961).

with intent than motive.<sup>162</sup> Though motive is frequently used to show intent it should be recognized that the springs of personal motive frequently exist beyond the dollar sign.<sup>163</sup>

Yet, in concluding that "in the absence of any allegation whatever to indicate that the agents of the corporation were acting in other than their normal capacities, plaintiff has failed to state a cause of action based on conspiracy under Section 1 of the Act,"<sup>164</sup> the court left open the possibility that action in other than a normal capacity could constitute such a conspiracy. The court again fails to distinguish clearly between the character of the conduct and the means by which it is accomplished. Judge Rives, in dissenting, makes this distinction and indicates that in his opinion the officers were acting beyond their normal duties.<sup>165</sup>

*Carnation*,<sup>166</sup> the third case brought solely against the corporation, relied heavily on *Nelson*, though the court also failed to distinguish between the nature of the conduct and its means of execution. Though the court found the charge of fixing a fictitious price for raw milk was not proved, and hence that no unreasonable restraint of trade had been imposed, it went further in making an attack upon the intra-corporate conspiracy doctrine.<sup>167</sup>

One can scarcely disagree with the court's statement that "a conspiracy cannot exist *between* a corporation and its officers," since as before noted, that is logically and conceptually impossible.<sup>168</sup> However, the question with which we are concerned is whether a conspiracy can exist between the officers of a corporation acting among themselves in its behalf; and if so, whether the corporation can be held liable. Since I believe that this possibility is what the court meant to deny, I must, of course, dispute their contention that such is a uniform holding of the cases. Only *Nelson* of the many cases they cite remotely supports such a contention and the actual holding of that case can not be extended so broadly.<sup>169</sup> This is implicitly recognized by the instant case when the court concludes that an intra-corporate conspiracy cannot be committed when the "officers and agents are acting for the corporation *in the ordinary scope of their duties*."<sup>170</sup> (Emphasis added.)

A final case in which an action was brought against the corporation alone charging a violation of the conspiracy portion of the Sherman Act is *Brehm v. Goebel Brewing Co.*<sup>171</sup> Perhaps no other case is so clear and un-

<sup>162</sup>Cf., *United States v. Patten*, 226 U.S. 525, 543 (1913). "[B]y purposely engaging in a conspiracy which necessarily and directly produces the result which the statute is designed to prevent, they are, in legal contemplation, chargeable with intending that result." It is unclear why "personal" motives should have any bearing on the matter. See *United States v. General Motors Corporation*, 121 F.2d 376, 406 (7th Cir. 1941).

<sup>163</sup>See LAUTERBACH, MAN, MOTIVES AND MONEY 18-23 (1954).

<sup>164</sup>200 F.2d at 914.

<sup>165</sup>*Supra* at note 97.

<sup>166</sup>*Marion County Cooperative Ass'n v. Carnation Co.*, 114 F. Supp. 58 (W.D. Ark. 1953).

<sup>167</sup>See note 105 *supra*.

<sup>168</sup>See note 134 *supra* and accompanying text.

<sup>169</sup>Subsequent cases have taken the same position in dictum, as is pointed out in note 124 *supra*, but these in turn have relied on *Nelson*, and likewise have been involved with situations in which the thesis has not been put to the test.

<sup>170</sup>114 F. Supp. at 63.

<sup>171</sup>*Trade Cases* ¶ 67,431 (W.D. Mich. 1953).

equivocal in attacking the intra-corporate conspiracy doctrine. In striking portions of the complaint the court opines that "it is clear that officers and employees *could not* conspire with themselves." To justify this position the court states that "if the acts . . . were within the scope of their employment, their acts would be those of the corporation, and, of course, if their doings were outside the scope of their employment, the defendant corporation would not be bound."<sup>172</sup> Obviously, these reasons do not support the first proposition. First, acts within the scope of employment are not only acts of the corporation but are probably acts which impose no unreasonable restraint on trade. Secondly, although it is by no means conceded that "doings" outside the scope of employment would not bind the corporation, even if it were conceded that the corporation could not be bound, this would not preclude an action being brought against the officers themselves.<sup>178</sup>

It is submitted that, contrary to the impression created by the Attorney General Committee's Report (*i.e.*, "Since there would concededly be no liability under Section 1, if a company does business through unincorporated branches . . . they believe it is wholly unreal to impose liability where it employs subsidiaries instead"),<sup>174</sup> the intra-corporate conduct of officers acting in behalf of their corporation can, under certain circumstances, constitute a *conspiracy* in violation of the Sherman Act.

To sustain this result it must be recognized that the following elements must exist to have a violation of section 1 of the Sherman Act. There must be an unreasonable restraint of interstate trade and this restraint must be imposed by means of a contract, combination, or conspiracy. If a specific course of conduct is proven as imposing an unreasonable restraint, the means by which it is accomplished can then be looked to, and if it is found to result from the action of two or more active participants, they can be held to have conspired to impose that restraint.<sup>175</sup> When they are proceeded against individually, they should not be permitted to take the "gopher" approach in asserting that we two men are but one corporation.<sup>176</sup>

It may be conceptually a little more difficult to justify reaching be-

<sup>172</sup>1953 Trade Cases at 68,161.

<sup>173</sup>See note 161 *supra*.

<sup>174</sup>COMMITTEE REPORT 35.

<sup>175</sup>The courts which have dealt with the problem seem to have taken the position that the easy way to get rid of a fact situation of limited merit is by mouthing a legal conclusion. The result of such a process may well be that when a situation arises where a bane occurs, the cure will have been spilled or at least diluted. There is time enough to decide the problem when a case is presented in which the court comes to the conclusion that an undesirable end is being achieved, but that there is no means to prevent it. It is unfortunate to make a premature choice on the matter, as is being done with the cases which use the *Nelson* "rule" in situations which no more called for it than did the source from which it sprang. See note 85 *supra*.

<sup>176</sup>"When a corporation acts through more than one person to accomplish an anti-social end, the increased likelihood of success, potentially more serious effects of the contemplated offense, and the danger of further unlawful conduct which are the essence of conspiracy rationales are present to the same extent as if the same persons combined their resources without incorporation. Society is benefited by viewing a corporation as a single legal entity only when it acts for proper ends. The policy should not be construed as requiring treatment of the group as an individual when it plans antisocial activities." *Developments in the Law of Criminal Conspiracy*, 72 HARV. L. REV. 920, 953 (1959). This has been partially recognized by *Beacon Fruit & Produce Co. v. Harris & Co.*, 152 F. Supp. 702 (D. Mass. 1957), discussed in note 124 *supra*.

hind the individual officers and holding the corporation liable for the conspiracy. Yet once a conspiracy is established, the problem is in reality no different from any other conspiracy charge. If the corporation can be held liable for the conspiracy of its officers to defraud the government,<sup>177</sup> it should also be liable for the conspiracy of its officers to impose an unreasonable restraint on interstate trade in its behalf.

The protection against the abuse of the concept envisaged by the Committee Report<sup>178</sup> is in adhering to the clear-cut requirement that an unreasonable restraint of trade must be imposed.<sup>179</sup> That the "normal commercial conduct of a single trader acting alone may *restrain* trade" is conceded. However, such an assertion does not take account of the fact that what the Sherman Act is concerned with preventing is *unreasonable* restraints on trade.<sup>180</sup> If, by the adoption of the rationale herein urged, "many activities of any business could be interdicted,"<sup>181</sup> the necessity for the measure far surpasses the academic interest which motivated the present treatment.<sup>182</sup>

### INTRA-ENTERPRISE CONDUCT

As previously noted, the term "intra-enterprise conduct" is an apt description of each of the three types of corporate activities which are the subject of this paper.<sup>183</sup> Since the strict intra-corporate phase of the problem has been previously treated, I am here concerned with that situation presented by a charge of a Sherman Act conspiracy between a parent and its subsidiaries or between two corporations subject to the control of the same individual or individuals.<sup>184</sup>

It is submitted that, since by definition two legal entities are involved, the conceptual difficulties which were presented in the case of a strict intra-corporate conspiracy do not exist.<sup>185</sup> If this be the case, it is difficult

<sup>177</sup>*Mininsohn v. United States*, 101 F. 2d 477 (3rd Cir. 1939). "In respect to the corporate appellant, it is well settled law that the guilty intent of officers of a corporation may be imputed to the corporation itself in order to prove the guilt of the corporation. [Citing cases.] The guilt of the Mininsohns in our opinion is not open to doubt and their guilty intent must therefore be imputed to the corporate appellant of which they are heads." *Id.* at 478.

<sup>178</sup>See note 16 *supra* and accompanying text.

<sup>179</sup>See note 287 *infra* and accompanying text for a discussion of what might possibly provide the "other factors" (see note 82 *supra*) to call for an application of an extension rule.

<sup>180</sup>See note 39 *supra*.

<sup>181</sup>COMMITTEE REPORT 31.

<sup>182</sup>"If a contrary result were to be reached under the Sherman Act a significant loophole would be afforded corporations engaging, without the assistance of outsiders, in activities that unreasonably restrain trade." Kramer, *op. cit. supra* note 152 at 141.

<sup>183</sup>See note 4 *supra* and accompanying text.

<sup>184</sup>See note 195 *infra* and accompanying text.

<sup>185</sup>But this by no means indicates that the doctrine does not have its opposition. In addition to the minority position of the Committee Report on this matter, others have taken up the cry. *E.g.*, "If this notion (of intra-enterprise conspiracy) develops into accepted doctrine, the implication for American industry and business may be that the only safe way to avoid violating the Sherman Act is to give up the advantages of multicorporate organization and consolidate into single legal units." McGuade, *Conspiracy, Multicorporate Enterprises, and Section 1 of the Sherman Act*, 41 VA. L. REV. 183 (1955). "Integration may be treated as an offense *per se*; integration which is efficient and controlled by a rational accounting system is twice vulnerable; a successfully integrated firm which uses its advantage in an aggressively competitive manner is in the worst position of all. . . . These

to see how it can be asserted "that in no instance *can* a parent and its subsidiary be held guilty of an offense that must be committed by more than one person."<sup>186</sup> The justification for such a position rests upon the further assertion that a company could avoid liability under section 1 by the use of unincorporated branches rather than subsidiaries and that it therefore would be "unreal" to hold them guilty in one instance and not in the other.<sup>187</sup>

Two objections can be raised to the taking of such a position. To begin with, as previously developed, it is not necessarily the case that there could not be liability under section 1, even though the form chosen was that of expansion by branch and division rather than by subsidiaries.<sup>188</sup> In the second place, even though it be conceded that the one form could successfully evade liability for a given course of conduct, this is not necessarily a justification for granting immunity for that same course of conduct carried out in a different form.<sup>189</sup> Admittedly the substance of the matter is the same in both instances. Yet, it seems to me that the basic error in the approach of this camp is in failing to recognize that the problem is of concern only in those instances where the *substance* of the matter is *an unreasonable restraint on trade*, which requires for its removal only that it be found to have been accomplished through the medium of a contract, combination, or, as in this case, a conspiracy.<sup>190</sup>

Simply because in the one case the defense of a single legal entity is allowed to preclude liability, and hence to allow perpetuation of the conduct, this should not be taken to establish immunity merely because of the relationship of the two legal entities in the second case. It would be unfortunate and unnecessary to allow the first defense to prevail.<sup>191</sup> The misfortune would be compounded were it used to furnish an escape in the absence of the conceptual defense on the sole ground that had it been done another way no liability would lie.

It would appear that a conceptual difficulty would be presented in only one situation of those to be considered. Before discussing this possible difficulty it may be helpful to point out the boundaries within which the intra-enterprise doctrine might be of concern. As noted, the one category is concerned with actions between a corporation and its subsidiaries or solely between subsidiaries.<sup>192</sup> It is apparent that to respectably argue an

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words have a gloomy sound. Amplified by a few legitimate adjectives and adverbs they can be made to roar like the crack of doom for the competitive system in the United States." Adelman, *Integration and Antitrust Policy*, 63 HARV. L. REV. 27, 76 (1949).

<sup>186</sup> Yet this is the position taken by *some* members of the Attorney General's National Committee. See COMMITTEE REPORT 35.

<sup>187</sup> COMMITTEE REPORT 35.

<sup>188</sup> Of course, such conduct could be reached on a theory other than that espoused in the first section of this article. See *e.g.*, the assertion made by the plaintiff in *Poller v. Columbia Broadcasting System*, 82 Sup. Ct. 486, 489, n.4 (1962) that divisions should come within the rule as to corporate subsidiaries.

<sup>189</sup> This would simply become one of the many factors which would have to be weighed in making a determination as to what form to take. Of course if the measure becomes whether the conduct is unreasonable, the result should in almost all instances be the same. See note 98 *supra*.

<sup>190</sup> See note 89 *supra*.

<sup>191</sup> See note 175 *supra*.

<sup>192</sup> See note 3 *supra*.

intra-enterprise defense one must restrict the definition of a subsidiary to those corporations which are either wholly owned by a parent, or if not wholly owned, then those corporations a majority of whose stock is held by a parent and the minority by non-competitors for investment purposes only.<sup>193</sup> The second category is concerned with actions between two or more corporations controlled through stock ownership by the same natural person or persons.<sup>194</sup>

The Committee Report points out that the situation where the corporations are controlled by a single individual's ownership of a majority of the stock with any minority held for investment purposes only is clearly equivalent to a parent-subsidiary relation.<sup>195</sup>

For this reason no effort will be made to distinguish between the two categories beyond the following observation on the possible conceptual difficulty.

If two corporations are owned by the same individual and his conduct alone, acting in their behalf, is the basis of a charge of conspiracy in restraint of trade under section 1 of the Sherman Act, it might be argued that since only one mind is involved, a conspiracy is impossible.<sup>196</sup> This would be based upon the recognized fact that a conspiracy requires a concert of action between two or more individuals. Obviously the prosecution would be faced with the task of proving that "this is two trees."

Even though it is to be remembered that the *Union Pacific Coal Company* case<sup>197</sup> rejected the possibility of a single corporation combining (conspiring) with a single officer, this should not preclude a contrary result in the present hypothetical. Corporation A through its single officer can be said to conspire with corporation B through its single officer. This despite the fact that the officer is the same individual and despite the fact that the officer himself could conspire with neither corporations as a representative of that specific corporation.<sup>198</sup>

One case which has specifically spoken on this subject is *Windsor Theatre Co. v. Walbrook Amusement Co.*,<sup>199</sup> in which an injunction and damages were sought as a result of an alleged conspiracy between the two defendant theatre corporations and six distributors, and between the two defendant corporations alone.<sup>200</sup> The defendant corporations were individual movie exhibitors whose stock was wholly owned by one Goldberg and his wife. The district court, in dealing with the contention that, even though the

<sup>193</sup>This is the definition adopted by the Attorney General's Committee, and seems preferable since it is obvious that otherwise the dealing would be in part with an actual competitor and hence clearly dual in nature. Cf., *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948) where a dissolution order was based upon such a rationale.

<sup>194</sup>See notes 199 and 283 *infra* and accompanying text for illustrative cases.

<sup>195</sup>COMMITTEE REPORT 35.

<sup>196</sup>"Plurality in the context of conspiracy should be viewed as a plurality of human minds, each of which is able to contribute consciously to the furtherance of the conspiracy." *Developments in the Law of Criminal Conspiracy*, 72 HARV. L. REV. 920, 952 (1959).

<sup>197</sup>*Union Pacific Coal Co. v. United States*, 173 Fed. 737 (8th Cir. 1909), note 18 *supra*.

<sup>198</sup>However, a conviction based upon such a situation was reversed in *United States v. Santa Rita Store Co.*, 16 N.M. 3, 113 Pac. 620 (1911).

<sup>199</sup>94 F. Supp. 388 (D. Md. 1950).

<sup>200</sup>*Id.* at 390.



distributors were not co-conspirators,<sup>301</sup> a conspiracy could nonetheless lie between the two defendants, stated as follows:<sup>302</sup>

Corporations can act only through their officers and agents and, of course, two corporations acting through two or more officers or agents may be guilty of a conspiracy. But it is elementary that there can be no conspiracy unless there is a meeting of two or more minds. In this case there is no evidence . . . that other officers or agents of either corporation had any conscious participation in Goldberg's competitive activities. It therefore needs no extended discussion or citation of authorities to show that there *could have been* no conspiracy of the two corporations on the evidence in this case. (Emphasis added.)

Although this language is directly contrary to the reasoning of the previous paragraph, it is not supported by much authority<sup>303</sup> and is unnecessary, since the finding of fact set forth in the opinion and accepted by the circuit court on appeal indicates that the conduct complained of was not an unreasonable restraint on trade.<sup>304</sup> The court on appeal<sup>305</sup> stated that "whether a conspiracy in restraint of trade exists is a question of fact" and "we are not at liberty to disturb a finding of fact made by the District Court unless it be clearly erroneous."<sup>306</sup> It is apparent that both courts failed to distinguish verbally between the nature of the conduct and the means by which it was performed. Yet, in the quoted language from the circuit court's opinion, it is obvious that the finding of fact upon which they relied was that there had been no unreasonable restraint of trade. The statement by the district court that there "could have been" no conspiracy in such a situation is a statement of law, and not of fact,<sup>307</sup> and as such would have been subject to review by the appeal court without bow-

<sup>301</sup>In relation to the charge of conspiracy between the exhibitors and the distributors, the court stated that the latter "did not consider it good business to give up an old and successfully tried customer for a new and unproved one. In so doing they acted independently and in no way collectively and the only motive actuating each of them separately was their ordinary business interests in exercising their lawful right to select their customers." 94 F. Supp. at 391.

<sup>302</sup>*Id.* at 396.

<sup>303</sup>As to C.J.S., which is cited in support, little need be said. Squarely in point and supporting their language is *United States v. Santa Rita Store Co.*, 16 N.M. 3, 113 Pac. 620 (1911). The final authority relied on is *Union Pacific Coal Company*, which, as pointed out at note 197 *supra* and accompanying text, does not control the question.

<sup>304</sup>Admittedly it would be difficult to conceive of a fact situation in this setting which would call for the declaration that an unreasonable restraint of trade had been imposed. Yet if some concatenation of events should bring it to pass, the dual entity required for a technical conspiracy is there. But at the least there is time enough to decide the question when it must be faced. To decide a matter of law, when the facts make it unnecessary to do so, is open to question.

<sup>305</sup>*Windsor Theatre Co. v. Walbrook Amusement Co.*, 189 F.2d 797 (4th Cir. 1951).

<sup>306</sup>*Id.* at 798.

<sup>307</sup>Of course, there is more than one way to interpret the statement of the district court that "there could have been no conspiracy of the two corporations on the evidence in this case." Note 202 *supra*. If, by "evidence," the court meant that dealing with the conduct of the defendant's officer, then the finding is clearly one of fact, the appeal court was correct in bowing to its discretion, and the case has no bearing on the present problem. On the other hand, if, by "evidence," the court was referring to the fact that there had been no finding that other agents had cooperated with Goldberg, then this finding would be binding as a matter of fact, but the legal consequence thought to follow therefrom would be a matter of law, and so open to review by the court of appeals.

ing to the discretion of the trial court had the factual situation been of a nature to highlight the ambiguity.<sup>208</sup>

A review of other cases dealing with the intra-enterprise conspiracy doctrine clearly indicates that the minority position set forth in the Committee Report<sup>209</sup> is without foundation in fact, as well as in logic, since these show that not only *can* a parent and its subsidiary be held guilty of an offense requiring more than one person for its commission, but in fact they *have been* so held. And any attempts to weaken the strength of such holding by rationalization can not remove the hard fact presented by a reading of the cases.<sup>210</sup>

It is true that many cases which were brought against affiliated corporations and their officers are easily sustained upon other grounds than that they support the reality of an intra-enterprise conspiracy. For example, *United States v. Crescent Amusement Co.*;<sup>211</sup> *United States v. Griffith*;<sup>212</sup> and *Schine Chain Theatres, Inc. v. United States*;<sup>213</sup> although charging conspiracy under section 1, also charged violations under the non-conspiracy part of section 2, and, in addition, alleged conspiracies between the affiliated corporations and other parties.

However, the district court in *Schine* found "*that the appellants had conspired with each other and with the eight major film distributors to violate section 1 and section 2 of the Sherman Act.*"<sup>214</sup> (Emphasis added.) Furthermore, the Supreme Court, in upholding this finding, stated that "the concerted action of the parent company, its subsidiaries and the named officers and directors . . . was a conspiracy which was not immunized by reason of the fact that the members were closely affiliated rather than independent."<sup>215</sup> (Emphasis added.)

Though such language was not imperative to upholding the injunction, since vertical conspiracies with non-affiliated companies were also charged,<sup>216</sup> nonetheless, such an unambiguous statement set forth by the Supreme Court detracts greatly from the assertion that a parent and its subsidiaries *can never* be held in violation of a statute requiring a plurality of actors.

A reading of *United States v. New York Great Atlantic & Pacific Tea Co.*<sup>217</sup> further detracts from such a bald assertion. In this case the named defendant and certain of its subsidiaries and affiliated companies, and officers of the A&P chain, were found guilty by the district court of

<sup>208</sup>This case (*Windsor*), perhaps better than any other, illustrates the dangers of failing to differentiate between the nature of the conduct and the means by which it is carried out. See note 98 *supra*.

<sup>209</sup>See note 186 *supra*.

<sup>210</sup>Thus it is submitted that the "notion" of intra-enterprise conspiracy is accepted doctrine. Of course, the dire implications portended in note 185 *supra* are unlikely to come to pass. It seems unlikely that an effort to prosecute a corporate family for activities which did not affect outsiders would be successful, not because it is impossible for the family to conspire, but because what they are doing is a reasonable exercise of their heritage under a "competitive system."

<sup>211</sup>323 U.S. 173 (1944).

<sup>212</sup>334 U.S. 100 (1948).

<sup>213</sup>334 U.S. 110 (1948).

<sup>214</sup>*Id.* at 115.

<sup>215</sup>*Id.* at 116.

<sup>216</sup>"[A] conspiracy between Schine and each of the named distributors was established by independent evidence. . . ." 334 U.S. at 117.

<sup>217</sup>173 F.2d 79 (7th Cir. 1949).

a conspiracy to restrain and monopolize trade in violation of sections 1 and 2 of the Sherman Act.<sup>218</sup> The appeal court stated the issue to be:<sup>219</sup>

Whether there is substantial evidence to show a *conspiracy* by the defendants to restrain and monopolize trade in commerce in food and food products by controlling the terms and conditions upon which the defendants and their competitors might do business and by oppressing competitors through the abuse of the defendants' mass buying and selling power. (Emphasis added.)

It should be noted that the charge under section 2 was based upon a conspiracy to monopolize and so was subject to the same requirement of a plurality of actors as was the section 1 charge. No extended discussion of the conduct of the defendants will be made at this point, but it may be pointed out that much of it was in effect unilateral in the *Colgate* sense,<sup>220</sup> i.e., "suppliers were in effect told that if they did not sell direct to all customers, A&P would withdraw its patronage."<sup>221</sup> Yet, in all fairness, it should be admitted that the great power of the defendant coupled with the flagrant abuse of that power would have sustained a conviction based on an indictment charging an attempt to monopolize.<sup>222</sup> But in spite of this concession it should still be recognized that the charge was conspiracy and the court so treated it.<sup>223</sup> Even though conduct in a subsequent case should not approach the magnitude of an attempt to monopolize, the conspiracy avenue has been left open by the A&P case.

The remaining cases dealing with the intra-enterprise conspiracy doctrine received varying degrees of treatment by the Attorney General's National Committee.<sup>224</sup> These cases will be discussed in chronological order and then an effort made to explore, in the setting of the Committee Report, the implications portended by them.

The first of these cases was *United States v. General Motors Corporation*,<sup>225</sup> which involved a criminal prosecution for a conspiracy to restrain interstate trade and commerce in violation of section 1 of the Sherman Act. The defendants were General Motors Corporation (GMC), General Motors Acceptance Corporation (GMAC), General Motors Sales Corporation (GMSC), General Motors Acceptance Corporation of Indiana (GMAC of Indiana), and individual officers. Since GMAC and GMSC are wholly owned subsidiaries of GMC, and GMAC of Indiana, is a wholly owned subsidiary of GMAC, the case presents a perfect example of the category under consideration.

<sup>218</sup>*Id.* at 81.

<sup>219</sup>*Id.* at 82.

<sup>220</sup>See note 230 *infra*.

<sup>221</sup>173 F.2d at 83.

<sup>222</sup>"While it is not necessary to constitute a violation of sections 1 and 2 of the Sherman Act that a showing be made that competitors were excluded by the use of monopoly power, [citing case], there is evidence in this record of how some local grocers were quickly eliminated under the lethal competition put upon them by A&P when armed with its monopoly power." 173 F.2d at 88. (Emphasis added.)

<sup>223</sup>"The purpose of Congress was to see to it that competition was not destroyed. To this end, in the most comprehensive and sensitive terms, Congress provided among other things that a conspiracy to restrain trade in commerce and to monopolize it in part should be a criminal offense. That is the offense of which the defendants stand convicted." 73 F.2d at 87.

<sup>224</sup>COMMITTEE REPORT 32-36.

<sup>225</sup>121 F.2d 376 (7th Cir. 1941).

In spite of the view taken by *some* members of the Attorney General's National Committee that this case "appears more a case of contract than of conspiracy,"<sup>1220</sup> "in essence the indictment [charges] that the *defendants conspired* to restrain unreasonably the interstate trade and commerce."<sup>1221</sup> (Emphasis added.) Although a reading of the case clearly indicates that the object of the conspiracy practically included a requirement by an unwritten term in the dealer contracts that they finance solely through GMAC, in fact, the court did not consider this an essential element.<sup>1222</sup> To have taken such a position may have left the way open for a demurrer to the indictment which did not name the dealers as co-conspirators nor charge the defendants with entering into contracts in restraint of trade.<sup>1223</sup> Concededly either charge might have been sustained by the facts of the case. Yet to assert that in the absence of facts sufficient to sustain such additional charges a conspiracy could not be found is contrary to the rationale of both the case and the actions of defendants' counsel who were doubtless well aware of the strict application of indictment charges in *United States v. Colgate*.<sup>1224</sup>

The court in stating "it is plainly inferable from the evidence . . . that a conspiracy had been formed"<sup>1225</sup> (emphasis added) indicates that no question existed as to its possibility. Although defense contended that they are "affiliated and non-competing units engaged in a single enterprise and hence . . . in effect a single trader; . . . and that a combination of competing units is essential to conspiracy under the Sherman Act,"<sup>1226</sup> the court felt that "clearly a vertical combination or combination of non-competers may conspire to restrain unreasonably the interstate trade and commerce of third parties and thereby subject themselves to the prohibitions of the Sherman Act. . . . Nor can the appellants enjoy the benefits of

<sup>1220</sup> COMMITTEE REPORT 35. "[T]he ultimate issue [was] whether the motor-car dealers were required, by an unwritten term of their dealership contracts, to use financing facilities, supplied by a subsidiary or affiliated finance company."

<sup>1221</sup> 121 F.2d at 382. Concededly the object may have been to force their dealers to the use of affiliated finance companies, but why a conspiracy to force compliance to a scheme for adhesive implied-in-fact contracts is any less a conspiracy is far from clear. If a conspiracy is able to force compliance, it can always be said that implied contracts are involved.

<sup>1222</sup> "The basic issue was whether the appellants had conspired to restrain the trade and commerce of dealers. It was proper for the Court to exclude all evidence not relevant to the issue or merely remotely relevant to the issue. The excluded evidence or offers of proof consisted of the failure of appellants' dealer witnesses to experience coercive treatment at the hands of appellants. Such evidence was not logically relevant to the issue and had no rational tendency to resolve the question of conspiracy." 121 F.2d at 405.

<sup>1223</sup> *Cf.*, *George W. Warner & Co. v. Black & Decker Mfg. Co., Inc.*, 167 F. Supp. 860 (E.D.N.Y. 1958). "[I]f the defendant is to meet the conspiracy charge, it is entitled to know who the parties to the conspiracy are alleged to have been." *Id.* at 862.

<sup>1224</sup> 250 U.S. 300 (1919). In this case the Supreme Court felt bound to follow the conclusion of the trial court as to the interpretation of the indictment, and accepted the position of the defendant that it alleged "only recognition of the manufacturer's undoubted right to specify resale prices and refuse to deal with anyone who failed to maintain the same." *Id.* at 306.

<sup>1225</sup> 121 F.2d at 402. "Unquestionably such a conspiracy as here shown violates the Sherman law, for it operates to force unreasonable terms and conditions upon independent traders and to impose control restrictions upon their trading, coercive conduct which necessarily burdens the interstate trade and commerce in their product and unduly limits their liberty to do business in the interstate markets." *Ibid.*

<sup>1226</sup> 121 F.2d at 404.

separate corporate identity and escape the consequences of an illegal combination in restraint of trade by insisting that they are in effect a single trader.'<sup>233</sup> The court, however, alluding to the view held by some of the Committee members, further asserted that "even if the single trader doctrine were applicable, it would not help the appellants."<sup>234</sup> Because of this statement, I feel that the court failed to consider the terms of the indictment, though I agree with their conclusion in other respects.<sup>235</sup>

As an interesting sidelight, it should be pointed out that the jury convicted the corporations and acquitted the individual officers. In reply to the claim that this was inconsistent and deserving of a new trial, the court admitted that, as a matter of logic, reconciliation of the verdicts was impossible but held that the question was one of whether the conviction was consistent with the evidence rather than with the acquittal of the individuals.<sup>236</sup> "In any event it is conceded that although a corporation acts only through its agents, their indictment is not a condition precedent to prosecution against the corporation."<sup>237</sup>

The complaint in *United States v. Yellow Cab Company*,<sup>238</sup> charged a combination and conspiracy to restrain and monopolize interstate trade and commerce in the manufacture and sale of taxi cabs. The defendants named were one Markin, and six corporate defendants more or less controlled by Markin. The complaint was dismissed by the district court for failure to state a claim upon which relief might be granted.<sup>239</sup> The Supreme Court, in upholding the allegation of conspiracy, concluded that:<sup>240</sup>

The fact that these restraints occur in a setting described by the appellees as a vertically integrated enterprise does not necessarily remove the ban of the Sherman Act. *The test of illegality under the Act is the presence or absence of an unreasonable restraint on interstate commerce.* Such a restraint may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent. . . . The corporate interrelationships of the conspirators, in other words, are not determinative of the applicability of the Sherman Act. That statute is aimed at substance rather than form. (Emphasis added.)

It should be pointed out that the complaint charged that the restraint was "not only effected by the combination . . . but was the primary object of the combination."<sup>241</sup> Since the Court also concluded that "any affiliation or integration flowing from an illegal conspiracy cannot insulate the

<sup>233</sup>*Ibid.* The language of the court could be interpreted as implying that if they forego the benefits of separate corporate identity, they could escape the consequences of their conduct.

<sup>234</sup>121 F.2d at 404.

<sup>235</sup>See note 229 *supra*.

<sup>236</sup>"In substance the appellants seek to make a case for setting aside the verdict on what appears to be either a jury mistake or jury leniency operating to their advantage." 121 F.2d at 411.

<sup>237</sup>*Ibid.* And see note 161 *supra*.

<sup>238</sup>332 U.S. 218 (1947).

<sup>239</sup>For opinion below, see 69 F. Supp. 170 (N.D. Ill. 1946).

<sup>240</sup>332 U.S. at 227. "And so in this case, the common ownership and control of the various corporate appellees are impotent to liberate the alleged combination and conspiracy from the impact of the Act." *Ibid.*

<sup>241</sup>332 U.S. at 227.

conspirators from the sanctions which Congress has imposed<sup>242</sup> it follows that either ground would have sustained the position of the Court. Yet the language is conclusive that a parent and its subsidiaries *can* conspire under the Sherman Act.<sup>243</sup>

The next case to appear before the Supreme Court was *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*<sup>244</sup> The defendants in this treble damage action, which had been successful in the district court but reversed by the court of appeals,<sup>245</sup> were the named defendant, its wholly owned subsidiaries, Seagram Sales and Calvert, and the latter's wholly owned subsidiary, Calvert Sales.<sup>246</sup> The complaint charged that respondents had "agreed or conspired to sell liquor only to those Indiana wholesalers who would resell at prices fixed by Seagram and Calvert."<sup>247</sup>

Among other allegations brought forth by respondents in an unsuccessful effort to sustain the decision of the circuit court was the suggestion that their status as "mere instrumentalities of a single manufacturing-merchandising unit" made it impossible for them to have conspired in violation of the Sherman Act.<sup>248</sup> In reversing, the Court stated that "this suggestion runs counter to our past decisions that common ownership and control does not liberate corporations from the impact of the anti-trust laws. . . . The rule is especially applicable where, as here, respondents hold themselves out as competitors."<sup>249</sup>

Here again, efforts have been made to limit the implications of the case by viewing it as one of concerted action to impose a resale price maintenance program by direct contracts and refusals to deal.<sup>250</sup> These attempts to bring the case within the ambit of *Beech-Nut* and away from *Colgate* is hamstrung by the facts of the case and the language of the Supreme Court. It would appear that the case was viewed as compatible with *Colgate* in all respects except that two corporate entities were involved.<sup>251</sup> Thus they

<sup>242</sup>*Ibid.*

<sup>243</sup>For a critical analysis of this case and a suggestion that the conduct would more properly have been reached under section 3 of the Clayton Act see McQuade, *Conspiracy, Multicorporate Enterprises, and Section 1 of the Sherman Act*, 41 VA. L. REV. 183, 189-92 (1955). But compare *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 603 n.13 (1953), where government counsel indicated doubts as to whether *advertising* was a "commodity" under section 3. And see *Northern Pacific Railway Co. v. United States*, 356 U.S. 1 (1958), where section 1 had to be relied on because shipping would not come within the terms of section 3 of the Clayton Act. And further, the *Times-Picayune* case indicates that an action under section 3 is easier to sustain than one under section 1 of the Sherman Act. 345 U.S. at 608-09.

<sup>244</sup>340 U.S. 211 (1951).

<sup>245</sup>For opinion below, see 182 F.2d 228 (7th Cir. 1950).

<sup>246</sup>In this regard the corporate set-up was similar to that existing in the *General Motors* case. See note 225 *supra* and accompanying text.

<sup>247</sup>340 U.S. at 212.

<sup>248</sup>*Id.* at 215.

<sup>249</sup>*Ibid.*

<sup>250</sup>The *Kiefer-Stewart* case may be viewed, consistently with its complaint, as one of concerted action to carry out and impose a resale price maintenance program, both by direct contracts and by refusal to sell. This view of the case would place it with *Federal Trade Commission v. Beech-Nut Packing Co.* and *United States v. Bausch & Lomb Optical Co.*, distinguishing the *Colgate* case on the grounds stated in the opinion." COMMITTEE REPORT 35.

<sup>251</sup>Thus the simple refusal to deal which is permitted by *Colgate* (see note 230 *supra*) was here a result of an agreement, but no coercive elements exist. "Petitioner . . . was informed by Calvert, however, that the arrangements [to deliver liquor] would not be carried out because Calvert had 'to go along with Seagram.'" 340 U.S. at 213.

state that "Seagram and Calvert acting individually perhaps might have refused to deal with petitioner or with any or all of the Indiana wholesalers. *But the Sherman Act makes it an offense for respondents to agree among themselves to stop selling to particular customers.*"<sup>252</sup>

A final case, which is comparatively easy for the attacker of intra-enterprise conspiracy to dilute, is *United States v. Timken Roller Bearing Company*.<sup>253</sup> In this case the complaint charged that the defendant had entered into contracts, agreements, and understandings with French Timken and British Timken to eliminate competition between themselves and others in the manufacture and sale of anti-friction bearings in the world market.

British Timken, though originally owned 50% by Timken and 50% by one Dewar, was at the time of trial owned 30% by Timken, 25% by Dewar, and the remainder in public holdings. French Timken in turn was owned 50% by Timken and 50% by British Timken.<sup>254</sup> It is therefore apparent that the case was not one involving parent-subsidiary relationships—neither by definition, nor by actual operations.<sup>255</sup>

A series of contractual agreements between defendant, British Timken and its predecessors, and French Timken, clearly stamped them as potential if not actual competitors. Although defendant asserted *inter alia* that the entire undertaking should be labeled a "joint venture" and hence immune to the Sherman Act, the district court found liability.<sup>256</sup>

On appeal to the Supreme Court, this finding was upheld.<sup>257</sup> Appellant contended, *inter alia*, that the restraints of trade revealed by the district court's finding could be justified as "reasonable," since "ancillary" to the "legal main transaction" of a "joint venture."<sup>258</sup> In rejecting this contention, three Justices reaffirmed *Kiefer-Stewart* in holding that "the fact there is common ownership or control of the contracting corporations does not liberate them from the impact of the antitrust laws."<sup>259</sup> In language more pointed to the instant case, they also concluded: "nor do we find any support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labeling the project a 'joint venture.' Perhaps every agreement and combination to restrain trade could be so labeled."<sup>260</sup>

In a concurring opinion two other Justices would seem to agree with the reasoning and quoted portion of the language adopted by their three

<sup>252</sup>*Id.* at 214.

<sup>253</sup>83 F. Supp. 284 (N.D. Ohio 1949).

<sup>254</sup>*Id.* at 292-94.

<sup>255</sup>See note 193 *supra*, and 83 F. Supp. at 306. "When in 1928 the American, British and French Companies agreed to continue their activities, British Timken had grown from infancy in the bearing industry to a position of dominance and was a potential competitor with whom defendant had to reckon."

<sup>256</sup>"The only conclusion which may properly be drawn is that the restraints were not ancillary to the 'joint venture.' To the contrary, the arrangements were made to carry on effectively the combination to eliminate competition between the parties and to frustrate any competition of outsiders." 83 F. Supp. at 311.

<sup>257</sup>341 U.S. 593 (1951).

<sup>258</sup>*Id.* at 597.

<sup>259</sup>*Id.* at 598.

<sup>260</sup>*Ibid.*

colleagues.<sup>261</sup> Thus, although they feel that it may seem "strange" to have a conspiracy between one corporation and another in which it has a large or major interest, "any other conclusion would open wide the doors for violation of the Sherman Act. . . ."<sup>262</sup>

Justice Frankfurter and Justice Jackson each rendered a dissenting opinion. It is difficult to gain a clear picture as to the precise grounds upon which they base their disagreement with the majority. But in analyzing their language it will be of assistance to recall the distinction between the type of conduct being performed and the means of its performance.<sup>263</sup> With this distinction in mind it seems clear that Justice Frankfurter, though he states himself to be associated, "in substance," with the dissent of Justice Jackson, bases his dissent on an evaluation of the nature of the restraint. Thus he stresses "the fact that the circumstances of foreign trade may alter the incidence of what in the setting of domestic commerce would be a clear case of unreasonable restraint of trade."<sup>264</sup>

It would likewise appear that the central theme of Justice Jackson's dissent would be in agreement with the contention of appellant that what it had done "is reasonable in view of current foreign trade conditions."<sup>265</sup> Thus after dealing with the conspiracy aspect of the case and conceding an application of the most strict doctrine he pointed out that "we still have the question whether the arrangement is an unreasonable restraint of trade or a method and means of carrying on competition in trade."<sup>266</sup> After defending his assertion that the latter was more descriptive of the arrangement under attack he concluded with the observation that "this decision will restrain more trade than it will make free."<sup>267</sup>

However, it should be recognized that the concession made by Justice Jackson in moving to his second line of defense would be a grudging one for any purpose but that of argument. Prior to making such concession he expressed doubt, correctly, in my view, "that it should be regarded as an unreasonable restraint of trade for an American industrial concern to organize foreign subsidiaries, each limited to serving a particular market area."<sup>268</sup> His position is reinforced by the admission of government counsel that had Timken set up separate *departments* to operate the foreign plants that "that would not be a conspiracy. You must have two entities to have a conspiracy."<sup>269</sup> Though I am inclined to agree with Judge Rives's view that government counsel "conceded too much,"<sup>270</sup> Justice Jackson accepted

<sup>261</sup>"It seems to me there can be no valid objection to that part of the opinion which approves the finding of the District Court that the Timken Roller Bearing Company has violated §§ 1 and 3 of the Sherman Act." 341 U.S. at 601. (Concurring opinion of Mr. Justice Reed, joined by The Chief Justice.) The difference of these Justices went to the divertiture decree. *Id.* at 602.

<sup>262</sup>*Id.* at 602.

<sup>263</sup>See notes 41, 175, and 204 *supra*.

<sup>264</sup>341 U.S. at 605.

<sup>265</sup>*Id.* at 599.

<sup>266</sup>*Id.* at 607.

<sup>267</sup>*Id.* at 608.

<sup>268</sup>*Id.* at 606. This, of course, was not the case. See notes 255 and 256 *supra*. There is no indication that such innocent conduct would be attacked. A different question would be presented if these corporate entities were to embark on a concerted plan to restrain the trade of outsiders.

<sup>269</sup>Quoted by Justice Jackson, 341 U.S. at 606.

<sup>270</sup>*Nelson Radio & Supply Co., Inc., v. Motorola, Inc.*, 200 F.2d 911, 916 (5th Cir. 1952) (dissenting opinion).



the distinction drawn in asserting that the result places too much weight on labels.<sup>271</sup>

### CONCLUSION

In evaluating the present position of the law in the area of intra-enterprise conspiracy, I will consider the position of the Attorney General's National Committee in the light of the discussed cases. As expressed in its Report, the language of the *Timken* case (and undoubtedly other cases) has caused some degree of alarm among certain companies who carry on business through subsidiaries.<sup>272</sup> It is submitted that the fear of these companies that the setting of prices or division of markets of the subsidiaries by the parent will be held to violate section 1 is unjustified<sup>273</sup>

The Committee Report puts forth the view that:<sup>274</sup>

The substance of the Supreme Court decisions is that concerted action . . . which has for its purpose or effect coercion or unreasonable restraint *on the trade of strangers* to those acting in concert is prohibited by Section 1. . . . Where such concerted action restrains no trade and is designed to restrain no trade other than that of the parent and its subsidiaries, Section 1 is not violated.

And the report goes on to state that "[most members] believe, for example, that when a parent and its subsidiary, though short of an attempt to monopolize, nonetheless plan to drive out a competitor, Section 1 may be transgressed."<sup>275</sup> While I agree with this view wholeheartedly, it is apparent that it makes an explicit admission of the application of the conspiracy doctrine to affiliated corporate bodies and is erecting the line of defense at the point of determining the nature of the conduct. Thus the issue becomes connected with the "rule of reason"<sup>276</sup> concept rather than the intra-enterprise conspiracy concept.

Although certain members take the position that liability can never be found against corporate families for an offense which must be committed by more than one person,<sup>277</sup> the position of the majority, the cases and logic itself place them on shaky ground. Other members, with an apparent distaste for the reach of conspiracy actions, attempt to reconcile the cases, in accord with their conception of the purpose of the law," as instances of contract or of combination, rather than of conspiracy.<sup>278</sup>

<sup>271</sup>341 U.S. at 607.

<sup>272</sup>COMMITTEE REPORT 33. This "alarm" has been fed fuel by such alarmists' statements as those set forth in note 185 *supra*.

<sup>273</sup>The position taken by those who oppose the application of an intra-enterprise conspiracy doctrine is that, since price fixing is illegal *per se*, the fixing of prices by a parent for its subsidiary will be condemned. This, of course, overlooks the fact that the "substance" and not the "form" controls, and that this can operate for, as well as against, the corporate family. If the mere fact that they are a "single trader" will not save them from their foibles, the mere fact that they are not a single entity will not damn them for their good faith and reasonable conduct. See note 98 *supra*.

<sup>274</sup>COMMITTEE REPORT 34.

<sup>275</sup>*Id.* at 35.

<sup>276</sup>See note 39 *supra*.

<sup>277</sup>See note 186 *supra*.

<sup>278</sup>See notes 226 and 250 *supra*.

Admittedly such cases as *General Motors*<sup>270</sup> and *Timken*,<sup>280</sup> could have sustained the same result upon other grounds than that of conspiracy. However, it is difficult to see how such alternative possibilities should serve to detract from the uncontradicted fact that a family of corporations can conspire among themselves. The language of the cases, the facts with which they dealt, and the logic behind their statements should serve as a warning that *unreasonable* conduct on the part of affiliated corporations will not necessarily be immunized even though it does not reach the formal stage of a contract or combination.<sup>281</sup> Certainly the facts of *Kiefer-Stewart* clarify this position. In spite of the attempt to justify this case on other grounds, it is clear that the conduct involved was of a definite *Colgate* nature with no hint of *Beech-Nut* flavor.<sup>282</sup>

It would seem that much of the concern over the application of the *intra-enterprise* conspiracy doctrine in the narrower sense is a result of the widespread misconception as to the status of the *intra-corporate* conspiracy doctrine.<sup>283</sup> Even though, in my opinion, the fact that some fish escape the net should not be seriously urged as an impelling reason to release the whole catch, in this case I feel that the argument need not be met. If the nature of the conduct is first looked to and a determination made that it imposes an unreasonable restraint of trade, it should be struck down if such can be done by a reasonable construction of the enabling statutes.<sup>284</sup>

Thus whether an enterprise is operated as a simple corporation, as a corporate family, or as a corporation with branches, the result should be the same in all events other than where a single officer is acting. For example, if the attempt to fix resale prices were felt to be an unreasonable restraint of trade, this should be stricken in a *Colgate* situation just as it

<sup>270</sup>Note 225 *supra*.

<sup>280</sup>Note 253 *supra*.

<sup>281</sup>"[T]he theory in back of the Sherman Law is to protect the free movement of goods in interstate commerce against unreasonable restraints, to assure open interstate markets where traders may freely negotiate sales, and to preserve the normal competitive forces which otherwise might operate in these markets." *United States v. General Motors*, 121 F.2d 376, 403 (7th Cir. 1941).

<sup>282</sup>See note 250 *supra*. In the *Beech-Nut* case there was manifest an effort to accomplish the end sought by highpowered and sharp practices. *Colgate*, on the other hand, simply involved, at least as the indictment was interpreted, a flat refusal to deal. So, too, was the *Kiefer-Stewart* case, but "then there were two." See note 251 *supra*.

<sup>283</sup>That is, much of the objection taken to the application of the *intra-enterprise* conspiracy doctrine hinges upon the assertion that the alteration to a single corporate form will save the day. It would indeed seem "absurd" to take the position that the same type of conduct is reasonable in the one case and unreasonable in the other. As a practical matter, there is more apt to be unreasonable conduct in the more complex dealings, but certainly if the retreat into a single shell does not necessitate leaving behind the weapons of the war against free competitive influences, then the retreat should be turned to a defeat by the sagacious use of the means at hand—to wit, the *intra-corporate* conspiracy doctrine.

<sup>284</sup>Perhaps the greatest objection to reading section 1 to cover such conduct is the assertion that there is not a substantive offense of restraining trade, but only the offense of contracting, combining and conspiring in restraint of trade. It seems that such an assertion begs the question rather than answering it. There would be no apparent objection to having a statute passed which made it unlawful to conspire to unreasonably restrain trade, any more than to declare it a crime to conspire to "injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the constitution or laws of the United States." 18 U.S.C. § 241 (1953). With its judicial gloss this is exactly what the Sherman Act provides.

was in *Kiefer-Stewart* and would be if the acting parties were General Motors and Ford.<sup>285</sup> Although it can be argued that *Colgate* was decided upon the specific ground that only one entity was involved, it is equally as convincing that the basis was a feeling that an attempt by one corporation was not of a serious enough nature to require action. That is to say, the rationale, rather than "we are powerless" may have been "we are not concerned." If the concern should arise in a later case brought to test the reach of *United States v. Parke, Davis & Co.*,<sup>286</sup> it is submitted that dormant power lies in section 1 of the Sherman Act.<sup>287</sup>

Therefore, the permissible course of conduct for any corporation should be determined by an evaluation of the nature of the undertaking itself, rather than by an attempt to erect technical and artificial barriers in an effort to furnish immunity. The first and most secure line of defense to erect and maintain is that embodied in the "rule of reason" concept.<sup>288</sup> If this line is pierced it seems unnecessary that the "single-trader" defense should prevail except in those rare instances where it is logically impossible to argue that "this is two trees," and, hence, to be brought within the ambit of the statute.

<sup>285</sup>Of course, in a literal *Colgate* situation, that is, the situation as set forth in the indictment as interpreted, there could not conceivably be found an unreasonable restraint of trade. However, if the attempt to circumvent the declared policy against resale price maintenance were to indulge the subterfuges and circumlocutions of the *Beech-Nut* case, the fact that the corporation used care enough to engage corporate employees in all activities should not leave the courts powerless to correct the situation.

<sup>286</sup>362 U.S. 29 (1960).

<sup>287</sup>"When the manufacturer's actions, as here, go beyond mere announcement of his policy and the simple refusal to deal, and he employs other means which effect adherence to his resale prices . . . he has put together a combination in violation of the Sherman Act." 362 U.S. at 44. (Emphasis added.) Since the Court has to reach in this case to find outsiders who can be said to be "combining," it appears that the case approach an intra-corporate combination doctrine. If a company should adopt a policy of resale price maintenance and attempt to effectuate it by a coding and reporting system, employing corporate employees to run down and cut off violators of its policy, would this be the "other means" spoken of in the *Parke-Davis* case? If so, it is submitted that calling the group a "combination" rather than a "conspiracy" will be pointless, since the combination will be for an unlawful purpose, and this is, of course, a conspiracy.

<sup>288</sup>See note 39 *supra*.

# MONTANA LAW REVIEW

*Member, National Conference of Law Reviews*

Volume 23

Spring, 1962

Number 2.

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Montana State University, Missoula, Montana